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For Reference only

SECOND REPORT

OF

HER MAJESTY'S COMMISSIONERS

FOR

REVISING AND CONSOLIDATING

THE

CRIMINAL LAW.

Appointed the 22nd day of February, 1845.

Presented to both Houses of Parliament by Command of Her Majesty.

LONDON:
PRINTED BY WILLIAM CLOWES AND SONS, STAMFORD STREET,
FOR HER MAJESTY'S STATIONERY OFFICE.

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COMMISSION.

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith. To Our right trusty and well-beloved Councillor *Sir Edward Ryan*, Knight, and Our trusty and well-beloved *Thomas Starkie*, *Robert Vaughan Richards*, *Henry Bellenden Ker*, and *Andrew Amos*, Esquires, Greeting; WHEREAS His late Majesty King William the Fourth did, by his Letters Patent bearing date the Twenty-third day of July, in the Fourth year of His Reign, appoint you the said Thomas Starkie, Henry Bellenden Ker, and Andrew Amos, together with William Wightman and John Austin, Esquires, to be his Commissioners for the purpose (amongst other things) of digesting into one Statute all the Statutes and Enactments touching Crimes, and the trial and punishment thereof, and also digesting into one other Statute all the provisions of the Common or unwritten Law touching the same, and for the purpose of inquiring and reporting how far it might be expedient to combine both these Statutes into one Body of the Criminal Law, repealing all other Statutory Provisions, or how far it might be expedient to pass into a Law the first mentioned only of the said Statutes: And whereas His said late Majesty did, by His Letters Patent, bearing date the Twenty-first day of October, in the Seventh year of His Reign, after revoking and determining the said first hereinbefore recited Letters Patent, appoint you the said Thomas Starkie, Henry Bellenden Ker, and Andrew Amos, and the said William Wightman, together with David Jardine, Esquire, to be His Commissioners for the purposes aforesaid: And whereas We did by our Letters Patent, bearing date the Twenty-sixth day of October, in the First year of Our Reign, after revoking and determining the said lastly hereinbefore recited Letters Patent of His said late Majesty, appoint you the said Thomas Starkie, Henry Bellenden Ker, and Andrew Amos, and the said William Wightman and David Jardine to be our Commissioners for the purposes aforesaid: And whereas the said Commissioners have from time to time, in obedience to the said several recited Letters Patent, made Reports containing, amongst other things, a Digest of the written and unwritten Law relating to the definition of Crimes and Punishments, accompanied by suggestions for such partial alterations as they considered to be necessary, and are about to make a Report on Criminal Procedure, with a Digest of the existing Law relating thereto: NOW KNOW YE, That We have revoked and determined, and by these Presents do revoke and determine our said recited Letters Patent, and every Clause, Article, and thing therein contained: And further KNOW YE, That We, reposing great trust and confidence in your zeal and ability, have authorized and appointed, and by these Presents do authorize and appoint you the said Thomas Starkie and Henry Bellenden Ker to complete the said Report on Criminal Procedure, with a Digest of the Law relating thereto, and you the said Sir Edward Ryan, Thomas Starkie, Robert Vaughan Richards, Henry Bellenden Ker, and Andrew Amos, or any Three or more of you to be Our Commissioners for the purpose of considering the said Reports and the alterations therein suggested, and the expediency of consolidating into one or more Statute or Statutes,

agreeably to the Digest contained in such Reports, or with any and what alterations and additions, the whole or any part or parts of the Criminal Law, as well written as unwritten, and for preparing the Draft of a Bill or Bills for that purpose, and further for inquiring into and reporting separately respecting such Statutes or parts of Statutes relating to Criminal matters, as in your opinions ought to be repealed, and for preparing the Draft of a Bill or Bills for that purpose: And for the better effecting the purposes of this Our Commission by you the said Sir Edward Ryan, Thomas Starkie, Robert Vaughan Richards, Henry Bellenden Ker, and Andrew Amos, We do by these Presents give and grant to you the said Sir Edward Ryan, Thomas Starkie, Robert Vaughan Richards, Henry Bellenden Ker, and Andrew Amos, or any Three or more of you, full power and authority to call before you, or any Three or more of you, such Persons as you shall judge necessary, by whom you may be the better informed on the subject of this Our Commission, and every matter connected therewith, and also to call for, have access to, and examine all such official Books, Documents, Papers, and Records as may afford the fullest information on the subject, and to inquire of and concerning the premises by all other lawful ways and means whatsoever: And We do hereby give and grant to you the said Sir Edward Ryan, Thomas Starkie, and Robert Vaughan Richards, Henry Bellenden Ker, and Andrew Amos, or any Three or more of you, full power and authority, when the same shall appear to be requisite, to administer an Oath or Oaths to any Person or Persons whatsoever to be examined before you, or any Three or more of you, touching or concerning the premises: And Our further will and pleasure is, that you the said Sir Edward Ryan, Thomas Starkie, Robert Vaughan Richards, Henry Bellenden Ker, and Andrew Amos, or any Three or more of you, do and shall certify to Us in Our Court of Chancery, on Parchment, under your Hands and Seals respectively, your several proceedings in this matter, as the same shall be respectively completed and perfected: And We will and command, and by these presents ordain, that this Our Commission shall continue in full force and virtue, and that you the said Sir Edward Ryan, Thomas Starkie, Robert Vaughan Richards, Henry Bellenden Ker, and Andrew Amos, or any Three or more of you, may from time to time proceed in the execution thereof, and of every matter and thing therein contained, although the same be not continued from time to time by adjournment: And We hereby command all and singular Our Justices of the Peace, Sheriffs, Mayors, Bailiffs, Constables, Officers, Ministers, and all other Our loving subjects whatsoever, as well within Liberties as without, that they be assistant to you and each of you in the execution of these presents: And for your assistance in the due execution of this Our Commission, We have made choice of our trusty and well-beloved *James John Lonsdale*, Esquire, Barrister-at-Law, to be Secretary to this Our Commission, and to attend you, whose service and assistance We require you to use from time to time as occasion may require. In Witness whereof we have caused these Our Letters to be mdea Patent. Witness Ourself at Westminster, the Twenty-second day of February, in the Eighth year of Our Reign.

By Writ of Privy Seal,

EDMUNDS.

SECOND REPORT.

TO THE QUEEN'S MOST EXCELLENT MAJESTY, IN HER HIGH COURT OF CHANCERY.

We, Your Majesty's Commissioners, appointed by Your Majesty's Commission bearing date the 22nd day of February, in the Eighth Year of Your Majesty's Reign, in presenting our Second Report to Your Majesty, humbly beg to observe, that by the original Commission issued by His late Majesty, certain Commissioners therein named were required "to digest into one statute all the statutes and enactments touching crimes, and the trial and punishment thereof; and also to digest into one other statute all the provisions of the common or unwritten law touching the same, and to inquire and report how far it may be expedient to combine both those statutes into one body of the Criminal Law, repealing all other statutory provisions; or how far it may be expedient to pass into a law the first-mentioned only of the said statutes, and generally to inquire and report how far it may be expedient to consolidate the other branches of the existing Statute Law, or any of them." The former Commission having expired upon the demise of the Crown, Your Majesty was graciously pleased to issue a new Commission in the same terms as that issued by His late Majesty.

Under these two Commissions the Commissioners, having considered the matters referred to them, gave their opinion in favour of the utility of framing a Digest of the Criminal Law, and stated various arguments in support of their views on the subject. They also presented a complete Digest of the Criminal Law. In framing this Digest the Commissioners, in several instances, judged it expedient not to present the existing provisions of the law, but certain modifications thereof, of which they deemed the advantage to be manifest. And they, moreover, suggested various other modifications of the existing law, which they thought were proper to be made, but which they did not think fit to introduce into their Digest, on account of the limited nature of their authority.

Your present Commissioners have proceeded to execute the enlarged powers of the present Commission, by which they are directed not simply to digest the law in its present state, but also, in consolidating its provisions, to put into a form suitable for being passed by the Legislature such modifications of the actual law as they judge expedient to submit for the adoption of Parliament.

They entirely agree with the Commissioners acting under the preceding Commissions in their opinion regarding the importance of framing a Digest of the Criminal Law. The propriety of rendering that law more accessible to the community, they think, cannot admit of doubt. An ascertained text will also afford more easy means of future alteration, whereby the inconveniences of the law

may be rectified, and it may be adapted to meet new circumstances and exigencies, without impairing the uniformity of the system. As to which point it is observable, that a great number of the definitions and punishments of offences has been enacted in statutes, passed at different periods, without due regard to the general principles of the Law, or the consistency of particular provisions. It is conceived, also, that judicial magistrates will be greatly assisted by having an authentic and systematic text of the Law to which they can refer, though in the application of it to particular cases, considerable scope must always remain for the exercise of judgment and explanatory exposition, (as is now the case,) by those intrusted with its administration. With respect to the mode in which future additions to and alterations of the Law may be made, your Commissioners concur in opinion with the preceding Commissioners, that it would be desirable that such alterations and additions should be notified to the public by means of the "Gazette," or some other official document, and that at the end of some fixed period, *e.g.*, three years, they should, by the authority of Parliament, be embodied in the Digest. On this subject, however, and that, generally, of the utility of a Digest of the Criminal Law, your Commissioners beg to refer more particularly to the Reports of the preceding Commissioners.

Your Commissioners concur in general with the modifications of the existing law adopted or suggested by the preceding Commissioners; they think also that some further modifications are essential, in order to render the Criminal Law of the country suitable to the present state of society, and conformable to enlightened principles of jurisprudence. A simple Digest of the actual law, without any modification, would, they apprehend, exhibit many imperfections, which, it cannot be doubted, it must be thought highly expedient to remove.

Without adverting to all the defects in various branches of the existing law, or anticipating at length what will be more particularly considered in the course of this Report, it must surely be deemed expedient to modify several of the present provisions of the law concerning accessories after the fact,—the justifications and extenuations of homicide,—the protection of officers of law whilst engaged in the execution of warrants or other legal process,—marital coercion,—the punishment of accidental injuries without reference to intention or the probable consequences of actions,—that relic of barbarism, the law of mayhem,—besides several other existing provisions, of which modifications are submitted in the present Report.

On some matters, though we do not feel entire confidence in our recommendations, we conceive that advantage may arise from submitting enactments founded on our opinions, the rejection of which, if unapproved of, will not be attended with any material delay or inconvenience; and the task of reducing into a statutory form the will of the Legislature, when it is ascertained, as regards any alterations, cannot occupy considerable time. Of matters of this latter description, the new provisions submitted by your Commissioners on the law regarding duels are offered with great hesitation, not so much on account of doubts entertained by the Commissioners, as because it is a subject deeply affecting the interests of society, and upon which public opinion is much divided.

As the modifications of the existing law proposed by the former and your present Commissioners occasionally affect principles of the deepest importance and most extensive influence, their consideration has necessarily occasioned much research and consultation, and has consumed much longer time than if the

labours of your Commissioners had been confined simply to forming a Digest of Statutes, the principles laid down in text writers of authority, and the decisions applicable to the subjects treated of in the present Report.

In their present Report, your Commissioners humbly submit to your Majesty the draft of a Bill, framed in a shape to be passed by the Legislature, for the purpose of consolidating all the provisions of law as modified by your Commissioners regarding the general matters treated of in the preliminary Chapter of the Schedule to that Bill, and the definitions and punishments of the offence of homicide and other offences against the person. To particular Articles of the Schedule notes are appended, indicating where the existing law has been modified, and the nature of the particular modification; and the Bill and Schedule, without notes, are again given in the Appendix. Where the subjects to which the Articles relate have been discussed by the previous Commissioners, references have been given to the Reports in which those discussions are contained; and where it has been thought necessary, the sentiments of the present Commissioners, in reference to the proposed modifications, have been expressed.

Although your Commissioners have lost no time in submitting this portion of their labours to Your Majesty, and have, in pursuance of the authority under which they act, framed the draft of the Bill now submitted to Your Majesty, they submit that it will not be expedient to pass such Bill into a law before the whole Digest is completed. For it is obvious that, in order to secure entire uniformity of principle and arrangement, it is very expedient that the Commissioners should have examined the whole subject, as well the part relating to procedure as that regarding the substantive law. Much of useful generalization may thus also be effected, tending materially to render the Digest more accessible and intelligible. It can scarcely fail to happen, that any one chapter of the Digest may be rendered more precise and unobjectionable in every respect after the Commissioners shall have diligently scrutinized and reduced into proper Articles all the other Chapters; and until the views of the Commissioners, with reference to the mutual dependency of the several chapters and their general arrangement, shall be fully developed by the completion of the work, it is very probable that erroneous judgments may be formed of the practical operation and sufficiency of detached parts.

DRAFT OF A BILL,

INTITULED

"*An Act for Consolidating and Amending so much of the Criminal Law as relates to Incapacity to commit Crimes, Duress, the essentials of a Criminal Injury, Criminal Agency and Participation, and Homicide and other Offences against the Person.*"

Be it enacted, &c.

1. That the Schedule to this Act annexed shall be deemed and taken to be parcel of this Act, and that the Four Chapters of the same, and the Ten Sections of the said Chapters, and the 146 Articles of the said Sections, and the Headings thereof and the numbers thereof, respectively, shall be deemed and taken to be enacted by this present Act, as if each and every of the said Chapters, Sections,

Articles, Headings, and Numbers had been expressly and in terms herein recited, with the usual words and in the usual forms of enactment, or declaration, or proviso, as the case may be; and that from the passing of this Act every one guilty of any offence described in, or defined by, the said Schedule, shall be liable to such punishment as is therein appointed in respect of such offence.

2. That after the passing of this Act, the rule of law whereby a married woman charged with the commission of any crime is, in case her husband be present at the time, presumed to have acted under his coercion, unless it appear that she did not so act; and all rules of law contrary to the provisions of Chapter I. of the said Schedule shall be, and the same are hereby repealed and annulled. (*a*)

(*a*) Upon the subject of marital coercion, see the note to Article 9 of Section 1, of Chapter I. of the Schedule.

3. That no person shall, after the passing of this Act, be liable to prosecution by any indictment or information in respect of any offence against the person not included in the said Schedule.

4. Provided that nothing hereinbefore contained shall exempt any person from prosecution by indictment or information in respect of any offence against the person not included in the said Schedule in any case where, by any Act or Acts of Parliament, persons committing such offence are made specially punishable on account of the party against whom or the place wherein such offence is committed. (*b*)

(*b*) The necessity for this provision as an exception to Section 3, is occasioned by the limited nature of the Digest now submitted to your Majesty, should it be proposed to pass it into a law before the completion of the whole Digest of Crimes and Punishments. No such clause would be necessary if the whole Digest were completed. The following are examples of the offences to which the above provision is intended to apply, viz.: treason in shooting at the Queen, the offence of striking a judge whilst in the execution of his office, &c., &c.

5. Provided also that nothing herein contained shall exempt any offender from any proceeding in respect of any offence against the person in which any magistrate or commissioner is or shall be empowered to exercise any summary jurisdiction without trial by Jury.

6. Provided also that as regards any offence against the person perpetrated before the day of , 1846, and also as regards any offence against the person in part perpetrated by any act done before that day, and which offence shall be completed or consummated on or after that day, the offender shall be punishable as if this Act had not been passed.

7. That after the passing of this Act every offence in respect of which it is declared by the said Schedule that the offender shall incur the penalties of the 6th or any higher class, shall be tried in the same manner and be subject to all the same rules of procedure as if such offence were by the said Schedule declared to be felony; and every offence in respect of which it is declared by the said Schedule that the offender shall incur the penalties of any lower class, shall be tried in the same manner and be subject to all the same rules of procedure as if such last-mentioned offence were by the said Schedule declared to be a misdemeanor. (*c*)

(*c*) The object of the above Clause is to make the system of procedure at present applicable to felonies and misdemeanors, applicable to the offences contained in the Schedule, according to the provisions of the above clause, until your Commissioners shall have considered the whole subject of the degrees of crimes and trial of offenders.

SCHEDULE TO WHICH THIS ACT REFERS.

CHAPTER I.

Preliminary Declarations and Enactments.

SECTION 1.

Of Incapacity to commit Crimes and Duress.

Art. 1.

No person shall be criminally responsible for any act or omission, who at the time of such act or omission, is in a state of idiotcy.

Art. 2.

No person shall be criminally responsible for any act or omission, who, at the time of such act or omission, by reason of unripeness or weakness of mind, or of any unsoundness, disease or delusion of mind, wants the capacity, which the law otherwise presumes every person to possess, of discerning that such act or omission is contrary to the law of the land. (*a*)

(*a*) A great number of different rules have been laid down by judges and text-writers of authority for ascertaining when a person shall be exempted from criminal responsibility, on the ground of insanity.

Lord Hale (Pl. of the Crown, vol. i. p. 30,) speaking of partial insanity, says, "The best rule I can think of is this: such a person as, labouring under melancholy distempers, hath yet ordinarily as great understanding as ordinarily a child of 14 years hath, is such a person as may be guilty of treason or felony."

Mr. Serjeant Hawkins (Pl. of the Crown, b. i. c. 1, s. 1) says "Those that are under a natural disability of distinguishing between good and evil, as infants under the age of discretion, idiots, and lunatics, are not punishable, &c."

In Lord Ferrers's case, which was tried before the House of Lords (19 How. State Tri. p. 947), it was urged, on the part of the prosecution, that complete possession of reason was unnecessary to warrant the judgment of the law, and that it was sufficient if the party had such possession of reason as enabled him to comprehend the nature of his actions, and discriminate between moral good and evil. And he was found guilty and executed.

In Arnold's case, (MS. Collison on Lunacy, p. 475, cited 1 Russell, by Greaves, p. 9,) Mr. Justice Tracey left the case to the jury, observing, that it is not every idle and frantic humour of a man, or something unaccountable in his actions, which will show him to be such a madman as is to be exempted from punishment; but that where a man is totally deprived of his understanding and memory, and does not know what he is doing any more than an infant, a brute or a wild beast, he will properly be exempted from justice or the punishment of the law.

Mr. Justice Le Blanc, in Bowler's case, (reported in Collison on Lunacy, p. 673, and cited 1 Russell, by Greaves, p. 10,) observed to the jury, that it was for them to determine whether the prisoner, when he committed the offence with which he stood charged, was incapable of distinguishing right from wrong, or under the influence of any *illusion*, in respect of the prosecutor, which rendered his mind at the moment insensible of the nature of the act he was about to commit; since in that case he would not be legally responsible for his conduct. On the other hand, provided they should be of opinion that when he committed the offence he was capable of distinguishing right from wrong, and not under the influence of such an illusion as disabled him from discerning that he was doing a wrong act, he would be amenable to the justice of the country, and guilty in the eye of the law.

In Bellingham's case, (Collison, Addend. p. 636, cited in 1 Russ., by Greaves, p. 11,) Mansfield, C. J. is reported to have said, that in order to support the defence of insanity, it ought to be proved that the prisoner was incapable of judging between right and wrong; that, in fact, it must be proved beyond all doubt that, at the time he committed the atrocious act with which he stood charged, he did not consider that murder was a crime against the laws of God and nature; and that there was no other proof of madness which would excuse murder or any other crime.

Lord Lyndhurst, C. B., in Offord's case, (5 Car. and P. 168,) told the jury that "they must be satisfied before they could acquit the prisoner on the ground of insanity, that he did not know when he committed the act what the effect of it, if fatal, would be, with reference to the crime of murder. The question was, did he know that he was committing an offence against the laws of God and nature?"

In Oxford's case, for shooting at the Queen (9 Car. and P. 525), Lord Denman, C. J., told the jury that the question was "whether the prisoner was labouring under that species of insanity which satisfies you that he was quite unaware of the nature, character and consequences of the act he was committing, or, in other words, whether he was under the influence of a diseased mind, and was really unconscious at the time he was committing the act that it was a crime."

But in Hadfield's case, for shooting at King George III. (Collison, p. 480, cited I Russ. by Greaves, p. 13), it would appear from the expressions made use of by the prisoner upon his apprehension, "he was tired of life; his plan was to get rid of it; he did not intend anything against the life of the King, and he knew the attempt only would answer his purpose," that he was aware he was committing a crime, and that he shot at the King because the doing so was criminal. Lord Kenyon, notwithstanding this evidence, held that as the prisoner was (as was proved at the trial) deranged immediately before the offence was committed, it was improbable that he had recovered his senses in the interim; and although, were they to run into nicety, proof might be demanded of his insanity at the precise moment when the

act was committed, yet there being no reason for believing him to have been at that period a rational and accountable being, he ought to be acquitted. The jury acquitted him accordingly on the ground of insanity.

The following is the provision of the French Code on the subjects of incapacity from insanity and of duress:—"Il n'y a ni crime ni délit, lorsque le prévenu était en état de démence au temps de l'action, ou lorsqu'il a été contraint par une force à laquelle il n'a pu résister."—Code Pénal, Art. 64.

It appears to your Commissioners that the criterion of knowing what is morally right or wrong, or what is consonant or opposed to the will of God, is not sufficiently certain for the direction of juries. More especially as the law respecting alleged crimes of various descriptions must be applied to persons of different religious persuasions and creeds. It is, moreover, observable, with regard to accused persons, that they sometimes intentionally, and deliberately, violate the law of the land, whilst they conscientiously believe that they are doing what is right, and that they are acting in subservience to the will of God.

The exemption from responsibility proposed by your Commissioners is founded on the principle, that persons in the state of mental incapacity, indicated by the Article in the text, would not be influenced by the force of example, if others, in a similar condition, were punished for inflicting injuries. From unequivocal causes out of their own control, they are incapable of perceiving that what might have been done by the individuals punished, was contrary to some distinct prohibition promulgated by the State, for their guidance.

In determining what causes of incapacity shall be deemed so unequivocal and apparent as to warrant a just inference that the punishment of an individual can be of no benefit as an example to others similarly circumstanced with himself, there is one rule generally approved of by jurists, which is, that every person must be presumed to know the law, and consequently to have a capacity to understand it, and to discern when he is violating it, unless he be subject to some peculiar visitation, not generally incident to humanity. This rule may sometimes operate harshly in countries where the criminal law is not promulgated to the community in an accessible form; nevertheless, the efficiency of penal enactments would be frustrated, if an inquiry were open, in every case, as to the capacity of persons to comprehend them, nothing having occurred to such persons out of the common course of nature.

Those peculiar circumstances which render particular persons incapable of discerning that acts or omissions are contrary to the law of the land ought, we conceive, to be restricted to cases of unsoundness, disease or delusion of mind. And, further, we think that these mental imperfections ought not to constitute any ground for exemption from responsibility, unless believed to be in operation with reference to the act or omission, which is the subject of inquiry. That degree of capacity must not be left to the accused which renders a person responsible for the breach of all rules of law alike, and this must appear with reference to the particular act with which he is charged. This inquiry may often require the aid of medical opinion, and may not unfrequently be rendered very easy, in consequence of the accused having indicated, by his actions or speeches that he had not only capacity to know, but had actual knowledge that he was violating the law. But, in no case, it is conceived, can it depend on an investigation, whether the degree of capacity left to the accused was sufficient for the comprehension of particular rules of law, with reference to their comparative difficulty.

But if the question were even to turn on the capacity left to an individual of understanding particular rules of law, and we were to lay out of consideration that capacity of comprehending the whole of the law which is presumed in the case of persons of sound mind, still we think that question would be one of more certainty, and one more proper to be proposed by the Legislature for the guidance of persons of whatever opinions as moralists, and of whatever religious creeds or persuasions, than questions regarding moral right or wrong, or regarding "the laws of God and man," especially as these questions must be viewed with the reference to the application of moral or divine laws to the infinite variety of human actions.

The right of society to repress an act, begins, when a party who is capable of knowing that society has prohibited the act, notwithstanding commits it. It will frequently happen, that the precautions or other actions, or the speeches of an individual charged with an offence, and who may, in many respects, unconnected with the particular transaction, be insane, will clearly indicate that he had capacity to discern, and did actually contemplate the rule of law prohibiting the act or omission imputed to him at the time he caused the injury of which he is accused. On the other hand, it may often be made clear by evidence, that an accused person, (even supposing him, whilst in a sound mind, not only constructively capable of discerning the law, but actually erudite in its provisions,) may, by reason of unsoundness, disease, or delusion of mind, have been rendered, in various ways, incapable of perceiving that in his conduct with regard to some particular act or omission, made punishable by law, he was violating any legal prohibition.

Ignorance of the law of the land, or unconsciousness of violating it, may not be incompatible with perfect capacity, in point of fact, to comprehend its provisions. And, further, the question of capacity in point of fact cannot be left open to be determined according to the circumstances, opportunities, and intelligence of particular individuals, where nothing has occurred to them out of the ordinary course of humanity. However, where the exemption from criminal responsibility is confined to cases in which the accused, in the particular act or omission with which he is charged is believed to have been incapable of discerning that it was contrary to the law of the land, by reason of unsoundness, disease, or delusion of mind, we submit first, that a plain criterion is afforded of the matter which is to be discerned, instead of one resting upon diversity of religious opinion, and often controversial doctrines of moral obligation: and, secondly, that, in the cases to which our exemption applies, the punishment of an individual would be of no adequate advantage, by way of example, to the state. We are, on the other hand, induced to believe, that the punishment of persons who inflict injuries, not being incapacited by unsoundness, disease, or delusion of mind, from discerning that what they did was contrary to the law of the land, will operate extensively and beneficially, by way of example, to deter others from the commission of offences who are in a like condition of mind, and who, in various respects, and in different acceptations of the term, may be denominated insane.

We subjoin the opinions of the majority of the judges upon questions regarding insanity, proposed to them by the House of Lords in 1844. We incline to think that they are in consonance with our own views, due regard being had to the peculiar form of the questions proposed, and to the distinction between the abstract rule of law and the mode of proposing questions to juries regarding the application of that rule, in order to guard against popular misconception of its import: without observing accurately this distinction, it might be supposed that the second and third paragraphs of the following opinion were contradictory.

The Lord Chief Justice Tindal, in stating the opinions of all the Judges, with the exception of Mr. Justice Maule, said—

"The first question proposed by your Lordships is this. What is the law respecting alleged crimes committed by persons afflicted with insane delusion, in respect of one or more particular subjects or persons; as, for instance, where, at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit?

"In answer to which question, assuming that your Lordships' inquiries are confined to those persons who labour under such partial delusions only, and are not in other respects insane, we are of opinion, that notwithstanding the party accused did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable, according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to law; by which expression we understand your Lordships to mean the law of the land.

"Your Lordships are pleased to inquired of us, secondly, 'What are the proper questions to be submitted to the jury, when a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons is charged with the commission of a crime (murder, for example), and insanity is set up as a defence?' And, thirdly, 'In what terms ought the question to be left to the jury as to the prisoner's state of mind at the time when the act was committed?' And as these two questions appear to us to be more conveniently answered together, we have to submit our opinion to be, that the jury ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that, to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong. The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused, at the time of doing the act, knew the difference between right and wrong; which mode, though rarely, if ever, leading to any mistake with the jury, is not, as we conceive, so accurate when put generally, and in the abstract, as when put with reference to the party's knowledge of right and wrong, in respect to the very act with which he is charged. If the question were to be put as to the knowledge of the accused, solely and exclusively with reference to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to conviction; whereas, the law is administered upon the principle that every one must be taken conclusively to know it, without proof that he does know it. If the accused were conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable; and the usual course therefore has been, to leave the question to the jury, whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong; and this course we think is correct, accompanied with such observations and explanations as the circumstances of each particular case may require.

"The fourth question which your Lordships have proposed to us is this: 'If a person under an insane delusion as to existing facts commits an offence in consequence thereof, is he thereby excused?' To which question the answer must of course depend on the nature of the delusion; but, making the same assumption as we did before, namely, that he labours under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if, under the influence of his delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man as he supposes, in self-defence, he would be exempt from punishment. If his delusion was, that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment."

With reference to the note of their colleague, Mr. Starkie, upon this Article, (see the same, p. 50, below) your other Commissioners think that he has misconceived the present rule of law; and that it might be inferred from his remarks that their test implied a capacity to understand some particular point of law as distinguished from other points, which we submit is not the case; and that he has underrated the difficulty of applying a test of moral right and wrong to the infinite variety of human actions, and has not sufficiently considered the impropriety of introducing a test of morality in a code of human laws.

Art. 3.

Provided that no person shall be exempted from criminal responsibility by reason of any temporary incapacity, which he shall have wilfully incurred by intoxication or other means. (*b*)

(*b*) There are many decisions in the books which turn upon a distinction between temporary and permanent incapacity from intoxication; other cases have been decided regarding the point, that, although intoxication is not an excuse for crime, it may be a fit subject for consideration with reference to the intention with which acts have been committed. These matters are fully considered in the Seventh Report of the Criminal Law Commissioners, p. 19.

Art. 4.

Incapacity by reason of unripeness of mind, as in Article 2 of this Section is mentioned, shall be presumed to exist in the case of an infant under the age of seven years, and proof to the contrary shall not be admitted.

Art. 5.

Incapacity by reason of unripeness of mind, as in Article 2 of this Section is mentioned, shall also be presumed to exist in the case of an infant of the age of seven years, and under the age of 14 years, unless the contrary be proved.

ART. 6.

Duress inducing well-grounded present fear of death shall be sufficient to excuse a person acting under such duress from penal consequences, except in case of treason and homicide. (*c*)

(*c*) In preserving the existing rules of law concerning duress, your Commissioners do not adopt the reasoning of Mr. Justice Blackstone, that "positive crimes are created by the laws of society, and that, therefore, society may excuse them, but that, in natural offences, so declared by the law of God, human magistrates are only the executioners of divine punishment." But proceeding on the principle that "actus non facit reum nisi mens sit rea," they nevertheless conceive that a distinction may be properly drawn between cases where a person commits treason or homicide and where he commits injuries inferior to that with which he himself is threatened, and which may be ever so trivial. And although they feel that punishment may be thought of little avail to counteract the influence of a well-grounded fear of death, and that no satisfactory distinction can be made between the offences of treason and homicide and various other grave offences, the majority of your Commissioners do not feel justified in recommending a change of the present law.

ART. 7.

Provided that in case of treason in "levying war against the King," or "adhering to the King's enemies," duress shall be sufficient to excuse a person, if such duress be a force upon the person, accompanied by a well-grounded present fear of death or of grievous bodily harm at the time of such person's joining rebels, and such force be a continuing force and such fear a continuing fear during all the time of his remaining with them, and provided that such person use every reasonable endeavour to resist or escape. (*d*)

(*d*) Looking to the peculiar nature of the treasons specified in the above Article, your Commissioners have thought that the duress which should excuse a person in case of those offences, might with justice be extended to a well-grounded present fear of grievous bodily harm. In this and the next Article, the object is not to anticipate the law of treason, but to dispose in one place of the subject of duress and its exceptions.

ART. 8.

Provided also that duress shall be sufficient to excuse a person in respect of supplying money, provisions, stores or any other thing whatsoever to be used in furtherance of any treasonable design or purpose, if such duress be a continuing force, accompanied by a continuing well-grounded fear of death or of grievous bodily harm, to the time of supplying such money, provisions, stores or other thing.

ART. 9.

No woman shall be liable to conviction in respect of any act of receiving her husband, or of receiving any other person in his presence and by his authority, or of harbouring or concealing her husband, or any other person in his presence and by his authority, or of aiding the escape of her husband from justice. (*e*)

(*e*) It appears to us that the present law is not sufficiently indulgent to wives who shelter their husbands after the commission of crimes. It only excuses the wife in the case of receiving the husband, or some other person jointly with her husband. The law of Scotland is less harsh in this respect. Mr. Alison, p. 669, says "By the first principles of nature, a wife is bound to protect, defend, and cherish her husband in all circumstances, and not the less so because he has been involved in crime, and has no refuge but in her affection and fidelity. She cannot, therefore, be involved in any prosecution for any act done by her from such motives, even though it should, in itself, savour of a criminal nature. "Uxor alicujus non tenetur virum suum accusare, nec furtum suum nec feloniam detegere, cum ipsa sui ipsius potestatem non habeat.—Stat. William, c. 19, No. 1." In these cases conjugal duty and feeling are not opposed by the consciousness of doing a manifest injury to some other person. We have accordingly enlarged the cases in which wives are exempted from punishment under such trying circumstances.

Your Commissioners have purposely omitted the following two Articles respecting marital coercion, which reduce to certainty several disputed points in the present law, and remove all doubts as to whether the presumption extends in favour of wives to the case of misdemeanors. All your Commissioners think that these Articles would be an improvement on the present law; but four of them are of opinion that they should be omitted entirely.

"A married woman charged with the commission of any criminal act shall, in case her husband shall be present at the time of the commission of such act, be presumed to have acted under his coercion, and be entitled to an acquittal, unless it is proved that she did not so act."

"Provided that no such presumption shall be made in case of any charge of treason, homicide, or attempting to murder or do grievously bodily harm, or of any other offence against the person hereinafter made punishable with death, or of rape or unlawfully and carnally knowing and abusing girls under 12 years of age."

The four Commissioners whose opinion is in favour of omitting these Articles beg to refer to the arbitrary limits within which the presumption in favour of the wife is confined, and the insufficiency of the reasons assigned for exceptions to its operation.

These exceptions are collected by Mr. Greaves, in a note to his edition of "Russell on Crimes," p. 25, where he says, "Bac. Max. 57, excepts treason only; Dalton, c. 147, treason and murder, citing for the latter, Mar. Lect. 12 (which I cannot find, perhaps some reader of some Inn of Court); 1 Hale, P. C., p. 45, 47, treason, murder and homicide; and p. 434, treason, murder and manslaughter; Kelyng 31, an *obiter dictum*, murder only; Hawk. b. 1, c. 1, s. 11, treason, murder and robbery; Bl. Com. vol. 1, p. 444, treason and murder; vol. 4, p. 29, treason and *mala in se*, as murder and the like." In

R. *v.* Stapleton, Jebb's Irish Cases, p. 93, a majority of the Judges were of opinion that the privilege of marital coercion did not extend to robbery.

The authorities appear to be conflicting as to whether misdemeanors are exceptions to the rule. According to Williams's Case, Salk. 384, the keeping of a house of ill-fame is an exception, so the keeping of a gaming-house, Dixon's Case, 10 Mod. 335; but, as stated by Mr. Greaves in a note to his edition of Russell, the former of these cases was in arrest of judgment, and therefore the court would presume, if necessary, that the wife had acted voluntarily, and the latter was on demurrer; and the Court would, and it seems did, hold the indictment good, because it might be found that the wife was not under coercion.

In Cruse's Case, 2 Moo. C. C. R. 53, which was argued before the Judges, it was held that a wife might be jointly convicted with her husband under the 7th Will. 4, and 1st Vic. c. 85, s. 11, of an assault, upon an indictment against both for inflicting a bodily injury dangerous to life, with intent to murder; but, as suggested by Mr. Baron Parke, an assault with intent to murder might perhaps be within the reason of murder. So a prosecution for a conspiracy is not maintainable against a husband and wife only; but the reason given for this is because they are esteemed but as one person in law, and are presumed to have but one will (Hawk. P. C. b. 1, c. 72, s. 89.)

In Reg. *v.* Price (8 Car. and P. 19), however, where the husband and wife were indicted for a misdemeanor in uttering counterfeit coin, it was held that the same rule which applied to felonies should apply to that case, Mirehouse, C. S., after consulting Bosanquet and Coltman J. J.

The exceptions in the cases of poison and murder depend, according to Sir M. Hale, on the ground that these offences are *mala in se*. Mr. Just. Blackstone writes, "In treason, no plea of coverture shall excuse the wife; no presumption of her husband's coercion shall extenuate her guilt, for he has no right to that obedience from a wife which he as a subject has forgotten to pay." With regard to murder, he writes, "This privilege is denied, because the offence is repugnant to the laws of nature, which shall never be contravened by the refinements of civil society." It may, perhaps, be thought, that on the assumption of the wife's reluctance to commit crime unless under the influence of marital coercion, her reluctance may be regarded as greater, and consequently the coercion more powerful, in those offences of great magnitude wherein the plea of coercion is not admitted. The wife's privilege formerly derived great support from the law regarding clergy, whereby, if such privilege had not been allowed, the wife would have been hanged, whilst the husband escaped.

Great practical difficulty is experienced by magistrates in cases of daily occurrence in which husbands and wives are brought before them for offences jointly committed; especially as it has been held that the greater activity of the wife in committing an offence is no ground for negativing the presumption of coercion. The term marital coercion is nowhere defined, and it would be very difficult to define, and consequently great uncertainty must prevail as to the circumstances which a Judge would deem sufficient to rebut the presumption of it arising from the husband's presence.

It seems inconsistent that proof of the strongest menaces by the husband, even though he be known by the wife to be close at hand, are not allowed to be any excuse, whilst the bare presence of the husband, without proof of direct interference, and though the wife be more active in the commission of the crime than himself, is a complete justification: and, moreover, we think the exceptions to the rule protecting the wife inconsistent with the principle of the rule itself, even in cases where the husband is present.

The present rule of law may be thought to offer an inducement to criminals to employ their wives to assist them in the execution of petty offences, and to prevent their wives from exercising the resistance and influence which is in their power.

Marital coercion is differently viewed from our law by the Scotch law, and in Mr. Livingstone's Code. Mr. Alison, in his "Principles of the Criminal Law of Scotland," p. 668, says "A wife is not excusable in the commission of any crime by the influence or power of her husband if she has taken any part in its commission along with him." And he further observes, "Nothing is better established in our practice than that the authority or coercion of the husband is no palliation for the commission of crimes by the wife, who is presumed to have at least such freedom of action left as to be capable of resisting the temptations to crime of whatever sort they may be; and this holds not only in regard to the more atrocious crimes, such as murder, robbery, fire-raising, but the smaller, such as theft, assault, reset, forgery, or the like, which are not so perilous by the danger and alarm with which they are attended. Nothing is more common, accordingly, than to have a husband and wife put to the bar and tried together on the same libel for the same offence." Mr. Livingstone's Code, Article 31, provides that a married woman committing an offence by the command or persuasion of her husband shall suffer no greater punishment than simple imprisonment for one-half of the time to which she would have been sentenced if she had committed the offence without such command or persuasion—and then, by Article 32, excepts from the operation of Article 31, offences punishable by transportation for life. We are not aware of any Foreign Code which adopts the English rule of law on the subject of marital coercion. The French, Austrian, Bavarian and Prussian Codes have been searched for this purpose.

SECTION 2.

Of Wilful, Malicious, Negligent, and Accidental Injuries.

With reference to Mr. Starkie's objection (see his note, p. 52, below) to the heading of this Section, your other Commissioners think that the present heading is a preferable index to the contents of the Section, inasmuch as it is not confined to criminal intention and negligence, but includes the consideration of accidental injuries; and, moreover, the present heading may be thought of a more practical and less abstract character than that proposed by Mr. Starkie.

Art. 1.

An injury shall be deemed to consist in any harm, damage or other evil consequence, caused to any person in body, mind, reputation, property or right, or any harm, damage or other evil consequence caused to the State or Public. (*a*)

(*a*) This Article may hereafter be conveniently transferred to the general Chapter of definitions. It is now inserted in this place for the purpose of obviating misapprehension as to the import of the term "injury" in the following Articles.

Art. 2.

An injury (*b*) resulting from an omission does not subject the person causing it to punishment, unless such omission be unlawful (*c*). An omission shall be deemed to be unlawful whensoever it is a breach of some duty imposed by law, or gives cause for a civil action.

(*b*) Their colleague, Mr. Starkie (see his note p. 52, below), supposes that in this Article the other Commissioners use the term "injury" in a different sense from that in which they have used it in Article 1. They think, however, it is plain that in this Article they use "injury" in the popular sense indicated in Article 1, and that the object of the Article is to specify in what cases an injury shall be unlawful, and when not. They think that there is no ground for supposing that Article 1 is confined to hurts prohibited by law. The term "injury" is adopted as being more compendious than the words "Hurt, damage, or evil consequence" repeated in all the Articles of the former Digest as prepared by the preceding Commissioners.

(*c*) All the authorities agree, that where an omission would have rendered a party guilty of it subject to an indictment, without reference to the particular consequences of such omission, there the party is criminally responsible for the consequences occasioned by such omission; but much difference of opinion has existed as to the further extension of criminal liability arising from omissions.

Mr. Livingstone, in his Code, renders persons liable for the consequences of omissions in various cases in which they were under no civil or criminal liability to do the act omitted.

Art. 484 of his Code provides that "Homicide by omission only, is committed by voluntarily permitting another to do an act that must in the natural course of things cause his death, without apprising him of his danger, if the act be involuntary, or endeavouring to prevent it, if it be voluntary. He shall be presumed to have permitted it voluntarily, who omits the necessary means of preventing the death when he knows the danger and can cause it to be avoided without danger of personal injury or pecuniary loss. This rule may be illustrated by the examples put in the last preceding Article:—If the blind man is seen walking to the precipice by one who knows the danger, can easily apprise him of it, but does not; or if one who knows that a glass contains poison, sees him about to drink it, either by mistake or with intent to destroy himself, and makes no attempt to prevent him; in these cases the omission amounts to homicide."

Art. 485 is as follows: "The exposing another to causes either natural or adventitious, which in the natural course of things must probably produce and do actually produce death, is homicide; and this may be either by act or by omission; the placing an infant or other helpless person in the open air during a winter's night, by which he is frozen to death, or in the midst of a frequented highway, where he is killed by the wheel of a carriage, is an illustration of this species of homicide by act.

He who shall with the knowledge of the danger leave a person of such description to perish in either of those situations, when he could have been removed without personal danger or pecuniary loss, commits this kind of homicide by omission."

The Indian Law Commissioners impugn the latitude of Mr. Livingstone's provisions, and their remarks have our general concurrence. In note M. to their Penal Code, the Indian Commissioners say, "Mr. Livingstone's Code provides, that a person shall be considered as guilty of homicide who omits to save life, which he could save "without personal danger, or pecuniary loss." This rule appears to us to be open to serious objection. There may be extreme inconvenience without the smallest personal danger, or the smallest risk of pecuniary loss, as in the case we lately put of a surgeon summoned from Calcutta to Meerut, to perform an operation. He may be offered such a fee that he would be a gainer by going. He may have no ground to apprehend that he should run any greater personal risk by journeying to the Upper Provinces than by continuing to reside in Bengal. But he is about to proceed to Europe immediately, or he expects some members of his family by the next ship, and wishes to be at the presidency to receive them. He, therefore, refuses to go. Surely he ought not, for so refusing, to be treated as a murderer. It would be somewhat inconsistent to punish one man for not staying three months in India to save the life of another, and to leave wholly unpunished a man who, enjoying ample wealth, should refuse to disburse an anna to save the life of another. Again, it appears to us that it may be fit to punish a person as a murderer for causing death, by omitting an act which cannot be performed without personal danger or pecuniary loss. A parent may be unable to procure food for an infant without money; yet the parent, if he has the means, is bound to furnish the infant with food, and if, by omitting to do so, he voluntarily causes its death, he may with propriety be treated as a murderer. A nurse hired to attend a person, suffering from an infectious disease, cannot perform her duty without running some risk of infection. Yet, if she deserts the sick person, and thus voluntarily causes his death, we should be disposed to treat her as a murderer.

"We pronounce with confidence, therefore, that the line ought not to be drawn where Mr. Livingstone has drawn it; but it is with great diffidence that we bring forward our own proposition. It is open to objections: cases may be put in which it will operate too severely, and cases in which it will operate too leniently; but we are unable to devise a better.

"What we propose is this, that where acts are made punishable on the ground that they have caused, or have been intended to cause, or have been known to be likely to cause a certain effect, omissions which have caused, which have been intended to cause, or which have been known to be likely to cause the same effect, shall be punishable in the same manner, provided that such omissions were, on other grounds, illegal. An omission is illegal (see Clause 28) if it be an offence, if it be a breach of some direction of law, or if it be such a wrong as would be a good ground for a civil action.

"We cannot defend this rule better than by giving a few illustrations of the way in which it will operate. A omits to give Z. food, and by that omission voluntarily causes Z.'s death. Is this murder? Under our rule it is murder, if A. was Z.'s gaoler, directed by the law to furnish Z. with food. It is murder if Z. were the infant child of A., and had, therefore, a legal right to sustenance, which right a civil court would enforce against A. It is murder if Z. was a bedridden invalid, and A. a nurse hired to feed Z. It is murder if A. was detaining Z. in unlawful confinement, and had thus contracted (see Clause 338) a legal obligation to furnish Z. during the continuance of the confinement with necessaries. It is not murder if Z. is a beggar, who has no other claim on A. than that of humanity.

"A omits to tell Z. that a river is swollen so high that Z. cannot safely attempt to ford it, and by this omission voluntarily causes Z.'s death. This is murder, if A. is a peon, stationed by authority to warn travellers from attempting to ford the river. It is murder if A. is a guide who had contracted to guide Z. It is not murder if A. is a person on whom Z. has no other claim than that of humanity.

"A savage dog fastens on Z. A. omits to call off the dog, knowing that if the dog be not called off it is likely that Z. will be killed. Z. is killed. This is murder in A. if the dog belonged to A, inasmuch as his omission to take proper order with the dog is illegal. (Clause 273). But if A. be a mere passer by, it is not murder.

"We are sensible that, in some of the cases which we have put, our rule may appear too lenient; but we do not think that it can be made more severe without disturbing the whole order of society. It is true that the man who, having abundance of wealth, suffers a fellow creature to die of hunger at his feet, is a bad man,—a worse man, probably than many of those for whom we have provided very severe punishment; but we are unable to see where, if we make such a man legally punishable, we can draw the line. If the rich man who refuses to save a beggar's life, at the cost of a little copper, is a murderer, is the poor man, just one degree above beggary, also to be a murderer if he omits to invite the beggar to partake his hard earned-rice? Again, if the rich man is a murderer for refusing to save the beggar's life at the cost of a little copper, is he also to be a murderer if he refuses to save the beggar's life at the cost of a thousand rupees? Suppose A. to be fully convinced that nothing can save Z.'s life unless Z. leave Bengal and reside a year at the Cape; is A., however wealthy he may be, to be punished as a murderer because he will not at his own expense send Z. to the Cape? Surely not. Yet it will be difficult to say on what principle we can punish A. for not spending an anna to save Z.'s life, and leave him unpunished for not spending a thousand rupees to save Z.'s life. The distinction between a legal and an illegal omission is perfectly plain and intelligible. But the distinction between a large and a small sum of money is very far from being so; not to say that a sum which is small to one man is large to another.

"The same argument holds good in the case of the ford. It is true that none but a very depraved man would suffer another to be drowned when he might prevent it by a word; but if we punish such a man, where are we to stop? How much exertion are we to require? Is a person to be a murderer if he does not go fifty yards through the sun of Bengal at noon, in May, in order to caution a traveller against a swollen river? Is he to be a murderer if he does not go a hundred yards?—if he does not go a mile?—if he does not go ten? What is the precise amount of trouble and inconvenience which he is to endure? The distinction between the guide who is bound to conduct the traveller as safely as he can, and a mere stranger, is a clear distinction. But the distinction between a stranger who will not give a halloo to save a man's life and a stranger who will not run a mile to save a man's life, is very far from being equally clear.

"It is, indeed, most highly desirable that men should not merely abstain from doing harm to their neighbours, but should render active services to their neighbours. In general, however, the penal law must content itself with keeping men from doing positive harm, and must leave to public opinion, and to the teachers of morality and religion, the office of furnishing men with motives for doing positive good. It is evident that, to attempt to punish men by law for not rendering to others all the service which it is their duty to render to others would be preposterous. We must grant impunity to the vast majority of those omissions which a benevolent morality would pronounce reprehensible, and must content ourselves with punishing such omissions only when they are distinguished from the rest by some circumstance which marks them out as peculiarly fit objects of penal legislation. Now, no circumstance appears to us so well fitted to be the mark as the circumstance which we have selected. It will generally be found in the most atrocious cases of omission; it will scarcely ever be found in a venial case of omission; and it is more clear and certain than any other mark that has occurred to us. That there are objections to the line which we propose to draw, we have admitted; but there are objections to every line which can be drawn, and some line must be drawn."

It appears to us that we are justified, as well by reason as by the authorities of English Law in rendering persons criminally liable for the consequences of omissions, which they were bound *by contract* to have avoided, although we are fully sensible of the inconvenience of referring to the civil law upon criminal trials. In the case of the Queen *v.* Marriott,) 8 Car. & P. 425, where it appeared that the prisoner who was indicted for the murder of the deceased, by confining her against her will, and not providing her with meat and necessaries, took the deceased, who was 74 years of age, home to live with him, on the death of her sister, with whom she had previously lived, saying that he would make her happy and comfortable, and on another occasion had said, that in consequence of a transaction which he mentioned, he had undertaken to keep the deceased comfortable as long as she lived, Mr. Justice Patteson said, "if the prisoner was guilty of wilful neglect, so gross and wilful that you are satisfied he must have contemplated the death of the deceased; then he will be guilty of murder: if, however, you think only that he was careless, that her death was occasioned by his negligence, though he did not contemplate it, he will be guilty of manslaughter. The cases which have happened of this description have been generally cases of children and servants, where the duty has been apparent. This is not such a case; but it will be for you to say whether from the way in which the prisoner treated her, he had not by way of contract, in some way or other taken upon him the performance of that duty which she, from age and infirmity, was incapable of doing." (After reading evidence as to the contract, he continued.) "This is the evidence on which you are called on to infer that the prisoner undertook to provide the deceased with necessaries; *and though, if he broke that contract, he might not be liable to be indicted during her life, yet if by his negligence her death was occasioned, then he becomes criminally responsible.*"

We are however, aware tha tparties under civil obligation by contract may occasionally, under very peculiar circumstances, be prevented from doing acts which they have engaged to do, by physical impossibilities or by contingencies which may appear justly to exempt them from criminal punishment for the consequences of their omissions so occasioned. We think, however, that in all such rare and extreme cases, the omitting party would be excused, since the omission could neither be referred to the heads of "wilfulness" or "negligence," the only grounds, according to our Digest, of criminal responsibility.

With regard to their colleague, Mr. Starkie's, objection (see his note, p. 52, below), to the definition proposed by the other Commissioners, of what shall constitute *unlawful omissions*, the other Commissioners conceive that this head of criminal law would have no practical operation, if it were confined to cases in which the omission would have been indictable independently of the particular result.

Art. 3.

An injury shall be deemed to be wilfully caused whensoever the person from whose act or omission such injury results, either directly intended it to result from his act or omission, or, believing that it was in any degree probable that such injury would result from his act or omission, incurred the risk of causing such injury (*d*).

(*d*) Sir M. Foster lays down a rule, that "if an action unlawful in itself be done deliberately, and with intention of mischief or great bodily harm to particulars, or of mischief indiscriminately, fall where it may, and death ensue, *against, or beside* the original intention of the party, it will be murder." Foster, 261. Hence the term "wilfully" is used in a more enlarged sense than as signifying "direct intention." This subject is more fully considered in the Seventh Report of the Criminal Law Commissioners, p. 22, et seq.

Art. 4.

An act shall be deemed to be maliciously (*e*) done or omitted, and an injury shall be deemed to be maliciously caused, whensoever such act or injury shall be wilfully done or omitted or caused respectively, without justification or excuse.

(*e*) The term *malice* is so interwoven with enactments of the Criminal Law that we have thought it expedient to retain it, notwithstanding the objection to it, on account of its signifying a very different thing from that which, in common parlance, it imports.

The adoption of the term, however, in the sense in which it is used in this Digest, will be so far beneficial as it will obviate the necessity for employing a number of terms savouring of much subtlety, and attended with some obscurity and uncertainty, such as "malice in fact," "malice in law," "implied and express malice," "malice aforethought." The definitions of the term "malice," it may be observed, are only to be found in text-writers, and dispersed decisions; nor are they always uniform or consistent.

According to Sir M. Foster, (Disc. II. of Homicide) "implied malice will, if carefully adverted to, be found to turn upon this single point, that the fact hath been attended with such circumstances as carry in them the plain indication of a heart regardless of social duty, and fatally bent upon mischief."

Mr. Serjt. Hawkins, (Pleas of the Crown, b. i. c. 31, s. 18.) "In general, any formed design of doing mischief may be called malice."

Mr. Just. Best, (Rex. Harvey, 2 Bar. & Cres. 268.) "We must settle what is meant by the term 'malice.' The legal import of this term differs from its acceptation in common conversation. It is not, as in ordinary speech, only an expression of hatred and ill-will to an individual, but means any wicked or mischievous intention of the mind. Thus in the crime of murder, which is always stated in the indictment to be committed with malice aforethought, it is neither necessary in support of such indictment to show that the prisoner had any enmity to the deceased, nor would proof of absence of ill-will furnish the accused with any defence when it is proved that the act of killing was intentional, and done without any justifiable cause."

Mr. Just. Bayley (MSS.) "Malice does not necessarily import any settled anger or desire of revenge; if the act is without any manner of excuse, and from frowardness of mind, it is malicious."

Mr. Just. Littledale, (M'Pherson *v.* Daniels, 10 Bar & Cres. 272.) "Malice, in its legal sense, denotes a wrongful act done intentionally without just cause or excuse."

Art. 5.

An injury shall be deemed to be negligently (*f*) caused whensoever it is not wilfully caused, but results from want of reasonable caution, in the undertaking and doing of any act, either without such skill, knowledge, or ability as is suitable to the occasion, or without due care taken to ascertain the nature and probable consequences of such act; or where it results from the not exercising reasonable caution in the doing of any act, either as regards the means used or the manner of using them, or from the doing of any act without using reasonable caution for the prevention of mischief, or from the omitting to do any act which a person using reasonable caution would not have omitted to do.

(*f*) The term "negligently" includes the undertaking of acts from which a person of ordinary prudence would have abstained, for which the term *rashness* might, in popular language, be deemed more appropriate. It is the absence of belief in the probability of the event which has occurred, prior to the act or omission which has occasioned the result, which distinguishes negligence from wilfulness. The nature of negligent injuries in various instances receives much illustration from the Section on "Negligent Homicide."

Art. 6.

An injury shall be deemed to be accidentally (*g*) caused, whensoever it is neither wilfully nor negligently caused. Accidental injuries do not subject the persons causing them to punishment, except as is hereafter in this Act mentioned.

(*g*) The principle adopted by the present law is that of punishing the act without reference to the intent, or probable consequences of a person's actions. In Eden's Principles of Penal Jurisprudence, it is stated, that "a man, shooting at a bird, and using proper and ordinary caution to prevent danger, unfortunately happeneth to kill his neighbour, the guilt of this man in the eye of the law, and consequently the proportion of his punishment, will depend partly on the nature, size, and shape of the bird, and partly on the intention of the man with respect to the bird; but it will have no connexion whatever with the act of homicide. If the bird chanceth in evidence to be a wild pigeon, *feræ naturæ et nullius in bonis*, it will be excusable homicide; if a tame fowl, and shot at for the amusement and improvement of the

marksman, it will be felonious and manslaughter, because an unlawful trespass on the property of another; lastly, if the bird were private property, and intended to be stolen, it will be murder, by reason of that felonious intent." The ancient law did not distinguish between different degrees of felony, and consequently the punishing of a person for one felony, where he intended quite a different felony, did not appear so incongruous as it must seem in the present day.

Your Commissioners think, that where there is any probable connexion between an injury and any act or omission, such that the punishment for occasioning the injury would deter persons from wilfully or negligently being guilty of such like acts or omissions, that there the injury may reasonably be deemed to be wilfully or negligently caused. But where there is no ground for believing that an injury was in the contemplation of the party charged with causing it, and the connexion is so remote between it and the act or omission, however unlawful, which has led to it, that it cannot be imputed to negligence, and that any punishment for causing the injury cannot operate by way of example to deter others from doing or omitting what the party accused has done or omitted, that there the injury should be deemed accidental and dispunishable; the party, however, remaining punishable for his illegal act, without reference to its remote and improbable consequences.

The existence of the present rule of law is, moreover, objectionable, on account of having led to subtle distinctions in regard to *mala prohibita* and *mala in se*, and *lawful* and *unlawful* sports, as to which the opinions of high authorities are not uniform or consistent.

According to Sir M. Foster (Disc. II. of Homicide), to constitute *accidental* homicide, "the act upon which death ensueth must be lawful: for if the act be unlawful, I mean if it be *malum in se*, the case will amount to felony, either murder or manslaughter, as circumstances may vary the nature of it. If it be done in prosecution of a felonious intention, it will be murder; but if the intent went no further than to commit a bare trespass, manslaughter: though I confess Lord Coke seemeth to think otherwise." "A. shooteth at the poultry of B., and by accident killeth a man; if his intention was to steal the poultry, which must be collected from the circumstances, it will be murder by reason of that felonious intent; but if it was done wantonly and without that intention, it will be barely manslaughter. The rule I have laid down supposeth that the act from which death ensueth was *malum in se*: for if it was barely *malum prohibitum*, as shooting at game by a person not qualified by statute law to keep or use a gun for that purpose, the case of a person so offending will fall under the same rule as that of a qualified man; for the statutes prohibiting the destruction of game, *under certain penalties*, will not, in a question of this kind, enhance the accident beyond its intrinsic moment." The same learned judge also makes the distinction between cases where death ensues from accidents happening at innocent and allowable sports and recreations, and death occasioned at such as are unlawful. In the former, contrary to what seems to be the opinion of Lord Hale (1 Pl. of the Crown, 472), he says that the death falls within the rule of excusable homicide. In speaking of the case of a child who was killed by a man, who missed his aim, at the diversion of cock-throwing at Shrove-tide, he says, "I once in the circuit ruled it manslaughter. It is a barbarous, unmanly custom, frequently productive of great disorders, dangerous to the bye-standers, and ought to be discouraged."

This subject has been very elaborately discussed by the Indian Law Commissioners. In note M. to their Penal Code, they say,—

"It may be thought that we have dealt too leniently by the offender, who, while committing a crime, causes death, which he did not intend to cause, or know himself to be likely to cause

"The law, as we have framed it, differs widely from the English law. 'If,' says Sir William Blackstone, 'one intends to do another felony, and undesignedly kills a man, this is murder:' and he gives the following illustration of the rule:—'If one gives a woman with child a medicine to produce abortion, and it operates so violently as to kill the woman, this is murder in the person who gave it.'

"Under the provisions of our code, this case would be very differently dealt with, according to circumstances. If A. kills Z. by administering abortives to her, with the knowledge that those abortives are likely to cause her death, he is guilty of voluntary culpable homicide, which will be voluntary culpable homicide, by consent, if Z. agreed to run the risk; and murder if Z. did not so agree. If A. causes miscarriage to Z., not intending to cause Z.'s death, nor thinking it likely that he shall cause Z.'s death, but so rashly or negligently as to cause her death, A. is guilty of culpable homicide, not voluntary, and will be liable to the punishment provided for the causing of miscarriage, increased by imprisonment for a term not exceeding two years. Lastly, if A. took such precautions that there was no reasonable probability that Z.'s death would be caused, and if the medicine were rendered deadly by some accident which no human sagacity could have foreseen, or by some peculiarity in Z.'s constitution, such as there was no ground whatever to expect, A. will be liable to no punishment whatever on account of her death, but will, of course, be liable to the punishment provided for causing miscarriage. It may be proper for us to offer some arguments in defence of this part of the Code.

"It will be admitted that, when an act is in itself innocent, to punish the person who does it because bad consequences, which no human wisdom could have foreseen, have followed from it, would be, in the highest degree, barbarous and absurd.

"A pilot is navigating the Hooghley with the utmost care and skill; he directs the vessel against a sandbank which has been recently formed, and of which the existence was altogether unknown till this disaster. Several of his passengers are consequently drowned. To hang the pilot as a murderer, on account of this misfortune, would be universally allowed to be an act of atrocious injustice; but if the voyage of the pilot be itself a high offence, ought that circumstance alone to turn his misfortune into a murder? Suppose that he is engaged in conveying an offender beyond the reach of justice; that he has kidnapped some natives, and is carrying them to a ship which is to convey them to some foreign slave colony; that he is violating the laws of quarantine at a time when it is of the highest importance that those laws should be strictly observed; that he is carrying supplies, deserters, and intelligence to the enemies of the state. The offence of such a pilot ought undoubtedly to be severely punished. But to pronounce him guilty of one offence, because a misfortune befel him while he was committing another offence; to pronounce him the murderer of people whose lives he never meant to endanger, whom he was doing his best to carry safe to their destination, and whose death has been purely accidental, is surely to confound all the boundaries of crime.

"Again, A. heaps fuel on a fire, not in an imprudent manner, but in such a manner that the chance of harm is not worth considering. Unhappily, the flame bursts out more violently than there was reason to expect. At the same moment a sudden puff of wind blows Z.'s light dress towards the hearth. The dress catches fire, and Z. is burnt to death. To punish A. as a murderer, on account of

such an unhappy event, would be senseless cruelty. But suppose that the fuel which caused the flame to burst forth was a will which A. was fraudulently destroying, ought this circumstance to make A. the murderer of Z.? We think not. For the fraudulent destroying of wills we have provided in other parts of the Code punishments which we think sufficient. If not sufficient, they ought to be made so; but we cannot admit that Z.'s death has, in the smallest degree, aggravated A.'s offence, or ought to be considered in apportioning A's punishment.

"To punish, as a murderer, every man who, while committing a heinous offence, causes death by pure misadventure, is a course which evidently adds nothing to the security of human life. No man can so conduct himself as to make it absolutely certain that he shall not be so unfortunate as to cause the death of a fellow-creature. The utmost that he can do is to abstain from everything which is at all likely to cause death. No fear of punishment can make him do more than this; and, therefore, to punish a man who has done this can add nothing to the security of human life. The only good effect which such punishment can produce will be to deter people from committing any of those offences which turn into murders what are in themselves mere accidents. It is in fact an addition to to the punishment of those offences, and it is an addition made in the very worst way. For example, hundreds of persons in some great cities are in the habit of picking pockets. They know that they are guilty of a great offence; but it has never occurred to one of them, nor would it occur to any rational man, that they are guilty of an offence which endangers life. Unhappily, one of these hundreds attempts to take the purse of a gentleman who has a loaded pistol in his pocket. The thief touches the trigger; the pistol goes off; the gentleman is shot dead. To treat the case of this pickpocket differently from that of the numerous pickpockets who steal under exactly the same circumstances, with exactly the same intentions, with no less risk of causing death, with no greater care to avoid causing death—to send them to the house of correction as thieves, and him to the gallows as a murderer, appears to us an unreasonable course. If the punishment for stealing from the person be too light, let it be increased, and let the increase fall alike on all the offenders. Surely the worst mode of increasing the punishment of an offence is to provide that, besides the ordinary punishment, every offender shall run an exceedingly small risk of being hanged. The more nearly the amount of punishment can be reduced to a certainty the better; but if chance is to be admitted, there are better ways of admitting it. It would be a less capricious, and therefore a more salutary, course, to provide that every fiftieth, or every hundredth thief, selected by lot, should be hanged, than to provide that every thief should be hanged who, while engaged in stealing, should meet with an unforeseen misfortune, such as might have befallen the most virtuous man while performing the most virtuous action.

"We trust that his Lordship in Council will think that we have judged correctly in proposing that when a person engaged in the commission of an offence causes death by pure accident, he shall suffer only the punishment of his offence, without any addition on account of such accidental death.

"When a person engaged in the commission of an offence, causes death by rashness, or negligence, but without either intending to cause death or thinking it likely that he shall cause death, we propose that he shall be liable to the punishment of the offence which he was engaged in committing, superadded to the ordinary punishment of involuntary culpable homicide.

"The arguments and illustrations which we have employed for the purpose of showing that the involuntary causing of death without either rashness or negligence ought, under no circumstances, to be punished at all, will, with some modifications which will readily suggest themselves, serve to show that the involuntary causing of death by rashness or negligence, though always punishable, ought under no circumstances to be punished as murder.

"It gives us great pleasure to observe that Mr. Livingstone's provisions on this subject, though in details they differ widely from ours, are framed on the principles which we have here defended."

The opinions just quoted have our general concurrence.—See also the observations on this subject contained in the Fourth Report of the Criminal Law Commissioners, p. 28.

The following are the Articles of the Austrian and Prussian Codes on the subject of Accidental Injuries:—

Austrian.—Art. 1.—"Malicious intent is requisite to constitute a crime; but malicious intent is imputable not only when the mischief connected with the crime has been directly compassed and resolved upon in any act or omission, but also where, with any other malicious design, something has been done or omitted from which the mischief which has, in fact, resulted from it usually does result from it, or, at least, readily may result from it."

Art. 2.—"Therefore an action or omission is not imputable as a crime (among other instances given) where the mischief has arisen from accident, carelessness, or ignorance of the consequences of the action."

Prussian.—Art. 36.—"If the injurious result arose from an act in itself lawful, through mere accident, the agent cannot be criminally responsible for it."

Art. 37.—"If the act which had the accidental result against the will of the agent were in itself unlawful, yet cannot the result itself be held to be a crime."

Art. 38.—"But in proportion to the possibility of foreseeing the injurious result by the criminal must be the severity of the punishment of the unlawful act itself, with respect to the injury arising therefrom."

Mr. Starkie's proposed Article (see his note, p. 52, below), exempting from punishment persons committing accidental injuries in the performance of lawful acts, raises the implication, your other Commissioners think, that where an act is unlawful, any accidental consequence ought, as a general rule, to subject the agent to punishment. Your other Commissioners think that, as a general rule, where a person does an unlawful act, and a consequence follows which has no probable connexion with it, and can neither be imputed to wilfulness nor want of caution, the agent should be dispunishable, except for the unlawful act in which he was engaged. The exceptions to such general rule, as where A., intending to kill B., kills C. by mistake, are referred to the principle on which they depend, in their proper place.

SECTION 3.

Of Criminal Agency and Participation.

ART. 1.

PARTIES to a crime are either principals or accessories.(*a*)

(*a*) Some material changes are proposed to be introduced into the Law of Principal and Accessory.

1. All difference of punishment between principals in the first and second degree and accessories is proposed to be abolished.

2. The offence of being an accessory after the fact is proposed to be abolished; and it is recommended to provide under the head of "Offences against the Administration of Justice" for such parts of the present law relating to accessories after the fact as it may be desirable to retain. Accessories after the fact, according to our understanding of that term, are unknown to the law of Scotland. "The Scotch law," says Mr. Alison, p. 68, "different in this particular from that of England, recognizes no accessories *after* the fact, except by such conduct as infers, by legal evidence, previous knowledge, counsel, or co-operation."

3. The offence of being an accessory is made a substantive offence.

4. The distinctions in the law upon the subject of accessories in cases of treason, felony, and misdemeanors, are taken away.

The distinction of punishment being taken away between principals in the first and second degree, and it never having been thought necessary to indict them as for distinct offences, there seems no longer any necessity to designate the distinction between them by any technical term. Similarly, it will be no longer necessary to add to the term "accessory" the words "before the fact."

The distinctions between the punishments of principals in the first and second degree, and again between their punishments and that of accessories before the fact, arose out of circumstances relating to capital punishments and the allowance of clergy in an early age of the law. They have occasioned great perplexity in the trial of offenders, who have often wholly escaped punishment in consequence of these distinctions. We have not deemed the injury to society in the three instances of principal in the first and second degree, and accessories, to be so different either in nature or degree, at least in general cases, as to require any inequality in the punishments. See the observations contained in the Seventh Report of the Criminal Law Commissioners, p. 29, 30.

ART. 2.

Every one is a principal in respect of a criminal act who either does it or causes it to be done otherwise than by a guilty agent; or who is one of several who so jointly do such act or cause it to be done; or who is present aiding in or abetting the doing of such act.

ART. 3.

A party shall be deemed to cause a criminal act to be done within the meaning of the last preceding Article who wilfully causes it to be done by means of any mechanical device or contrivance, or by any innocent person (whether such innocent person act unconsciously or under compulsion, or be or be not the person to whom injury is done), or by such means combined, and whether such party be present or absent when the means used take effect, and although accidental circumstances conduce to render the means used effectual for the doing of the criminal act intended.

ART. 4.

Where several distinct acts are essential to any crime, every one who either singly, or jointly with any other person or persons, does any of such acts in order to the commission of such crime, is a principal within the meaning of Articles 1 and 2 of this Section. And where any injury is essential to a crime, and several persons wilfully cause that injury, either by joining in the same act or by jointly or severally doing distinct acts, each of such persons is also a principal within the meaning of Articles 1 and 2 of this Section.

ART. 5.

Every one is a principal in respect of a criminal omission, who being bound either solely or jointly with any other person or persons, to perform any duty imposed by law, criminally omits to perform that duty.

ART. 6.

A party shall be deemed to be present, aiding in or abetting the doing of a criminal act within the meaning of Article 2 of this Section, who shall be near enough to lend any help to the person who does or persons who do the act, or to encourage such person or persons with the expectation of help, and who shall by consent or any other means help or encourage such person or persons in the doing of such act.

ART. 7.

Provided that no person shall be deemed to be present aiding or abetting within the meaning of the last preceding Article, who, having agreed with any other person or persons to effect any criminal purpose, shall abandon his design, and so separate himself from such other person or persons, that there was not, at the time when the act was done, any engagement on his part for, or any reasonable expectation in, such other person or persons of help from him.

ART. 8.

Every one is an accessory in respect of a criminal act done who, although not being present within the meaning of Article 6 of this Section, when the act is done, has, by commandment, advice, consent, aid, encouragement or otherwise, directly or indirectly, or immediately or mediately, procured or promoted the doing of it by a principal offender.

Every one is an accessory in respect of a criminal omission who has, by commandment, advice, consent, encouragement or otherwise, directly or indirectly, or immediately or mediately, procured or promoted the omitting by a principal offender to do the act the omission to do which is criminal.

ART. 9.

No person shall be deemed to have procured or promoted any criminal act or omission who shall, previously to such act or omission, abandon his design; provided that previously to such act or omission he shall countermand the criminal act or omission, and use his utmost endeavour to prevent the doing of such act, or to procure the due performance of the act the omission to do which is criminal, and provided also that the party guilty of such act or omission shall know that such act or omission is so countermanded.

ART. 10.

A party shall be deemed to have procured or promoted the doing of a criminal act within the meaning of Article 8 of this Section, although such act shall vary from that the doing of which such party shall have intended to procure or promote, provided the crime intended and the one perpetrated be substantially the same, and the person or thing against whom or with respect to which such crime is perpetrated be the person or thing against whom or with respect to which such crime was intended, or although the person against whom such crime is perpetrated be not the person against whom it was intended, if, by mistake or accident, the injury which constitutes the crime light upon a different person from the one against whom such injury was intended: so also, if the act done be a probable consequence of the endeavour to do that the doing of which is so intended to be procured or promoted.

ART. 11.

An accessory to a crime shall be deemed to be guilty of that crime; and every penal provision of this Act in respect of any criminal act or omission shall be applicable to accessories as well as to principals, as fully and effectually as if every such provision had by express words included accessories.

ART. 12.

If several persons assembled together shall have united in a common design to execute any criminal purpose, or any purpose whatsoever by criminal means, and shall endeavour to execute such design, all shall be deemed to be equally guilty in respect of any act done by any one or more of them in pursuance of and accordance with such design.

ART. 13.

Provided that if, after several persons shall have so united as in the last preceding Article is mentioned, any of them shall do any criminal act which is beyond the scope of such common design, such of them as shall not be privy or consenting to the criminal act so done shall not be responsible in respect of such act.

ART. 14.

Provided also, that where, after several persons shall have united in such common design as in Article 12 of this Section is mentioned, any of them shall, before the accomplishment of their purpose, or of any criminal act done in furtherance of

and within the scope of such design, abandon such design and withdraw from the further prosecution thereof, such person shall not, by reason only of his having so united with others as aforesaid, be responsible in respect of any criminal act done in furtherance of such design, after such abandonment and withdrawal, if previously to such act he shall use his utmost endeavour to prevent the doing of it.

ART. 15.

Whensoever a person would himself be justified or excused in the doing of any act, such justification or excuse shall be deemed to extend to any person acting in his aid or assistance.

ART. 16.

All the provisions contained within this Section, concerning acts done, and their consequences, shall, so far as such provisions may be applicable, apply to unlawful omissions and the consequences of such omissions.

ART. 17.

So every provision of this Section, concerning the commission of an offence, shall be deemed to be applicable to offences, consisting wholly or partly in some unlawful omission.

ART. 18.

In case any special provision hereinafter in this Act contained shall be wholly or in part inconsistent with any provision contained under this or the First or Second Sections of this Chapter, such special provision shall nevertheless be effectual to the same extent as if such previous provision, or so much of it as is inconsistent with such special provision, did not exist.

CHAPTER II.

HOMICIDE AND OTHER OFFENCES AGAINST THE PERSON.

SECTION I.

Of what Homicide the Law takes Cognizance.

ART. 1.

HOMICIDE is the killing of any human being. (*a*)

(*a*) The Commissioners have not inserted in the digest the ancient limitation confining prosecutions for murder to cases where the party injured dies within a year and a day after the cause of death. In Scotland, there seems to be no such rule. Mr. Alison (p. 151) says, "In the case of William Lewis, April 16, 1610, it appeared from the libel that the person wounded had survived the injury for 17 months, notwithstanding which it was sent to an assize." Except in very flagrant instances, the party injuring will be prosecuted immediately for some injury to the person short of death, which would preclude a subsequent prosecution for murder; and, unless in very plain cases, the distance of time would negative the inference that the death was occasioned by the cause to which it is attempted to ascribe it. But where there is no reasonable doubt that death has resulted from a particular cause, though the sufferings of the party injured have been protracted longer than a year, it seems that it may often be expedient for public justice that the party injuring should be indicted for murder; nor is there much danger of giving encouragement to prosecutions for murder on account of deaths remotely and uncertainly connected with injuries received.

ART. 2.

Where an injury is inflicted upon a child in the womb, such child is not to be deemed to be a human being within the meaning of the last preceding Article unless such child be afterwards born alive. (*b*)

(*b*) If a person strike a woman who is with child, whereby the child within her is killed, it is neither murder nor manslaughter, 1 Hale, 433. It seems always to have been the better opinion, if a child having been born alive, afterwards died, by reason of any potions or bruises it received in the womb, that it was murder in such as administered or gave them, 3 Inst., 50; 1 Hawk, P.C., c. 31, s. 16; 4 Black. Com., 198; 1 East's P.C., c. 5, s. 14, p. 228; and is now settled by Senior's Case, 1 Moo. C.C.R. 346; but Hale (1 Pl. of Crown, 432) and Staund. (Pl. of Crown, p. 21) thought otherwise, on account, it seems, of the difficulty of ascertaining the fact.

ART. 3.

It is not essential to being born alive, within the meaning of the last preceding Article, that the umbilical cord, whereby the child is connected with the mother,

should be separated, or that the circulation of the child's blood should be distinct from that of the mother. (*c*)

(*c*) The point of a child having been killed before a separation of the umbilical cord and a separate circulation in the child having occurred on judicial trials several times, and there being conflicting opinions of the Judges upon the subject, the Commissioners have thought it expedient to state that rule which appeared to them most proper.—(See R. *v.* Enock, 5 Car., and P. 539, and R. *v.* Wright, 9 Car., and P. 754, where it was stated by the Judges who tried these cases that there must be an independent circulation in the child.) Mr. Baron Parke, however, in R. *v.* Crutchley, 7 Car. and P. 814, stated it as his opinion, that if a child was strangled "intentionally, while it was connected by the umbilical cord to the mother, and after it was wholly produced," that it would be murder. In R. *v.* Trilloe, 2 Moo. C.C.R. 261, where the child was killed after it was produced alive, and had an independent circulation, but before the umbilical cord was separated, it was unanimously held at a meeting of the judges that it was murder. It does not appear from the Report of R. *v.* Crutchley, whether the child had an independent circulation or not; but from the judge who tried the prisoner in Trilloe's Case having agreed with the view of the law taken by Mr. Baron Parke in R. *v.* Crutchley, and only having reserved the case because Mr. Baron Parke had declared his intention to do so in case of a conviction; but the prisoner, having been acquitted, it became unnecessary to do so: it would seem that Mr. Baron Parke considered that the having an independent circulation depended upon the severance of the umbilical cord. If this be so, the present state of the law would appear to require that the child should have an independent circulation. We submit, however, that if a child be born wholly into the world alive, whether it have an independent circulation or not, it ought to be murder to kill it.

Art. 4.

The law takes no cognizance of homicide unless death result from bodily injury, caused by some act or omission, as contradistinguished from death occasioned by any influence on the mind, or by any disorder or disease arising from such influence. (*d*)

(*d*) That death may be occasioned by influence on the mind, and that when so occasioned it is attended with all the bad consequences of murder cannot be doubted. But such instances are of rare occurrence, and the difficulty of procuring a conviction for murder under such circumstances would be very considerable. And, on the other hand, a door might be opened, by a change of the law, for malicious prosecutions. Under these circumstances we do not feel justified in recommending the abandonment of a principle which has been sanctioned by long usage and high authorities. We conceive, however, that there is great weight in the reasoning urged by the Indian Law Commissioners in support of their adoption of a different course. They say, "Mr. Livingstone, we observe, excepts from the definition of homicide cases in which death is produced by the effect of words on the imagination, or the passions. The reasoning of that distinguished jurist has by no means convinced us that the distinction which he makes is well founded. Indeed there are few parts of his code which appear to us to have been less happily executed than this. His words are these—'The destruction must be by the act of another; therefore, self-destruction is excluded from the definition. It must be operated by some act. Therefore death, although produced by the operation of words on the imagination or the passions, is not homicide. But if words are used which are calculated to produce and do produce some act which is the immediate cause of death, it is homicide. A blind man, or a stranger in the dark, directed by words only to a precipice, where he falls and is killed, a direction verbally given to take a drug that it is known will prove fatal, and which has that effect, are instances of this modification of the rule.'

"This appears to us altogether incoherent. A. verbally directs Z. to swallow a poisonous drug. Z. swallows it and dies. And this, says Mr. Livingstone, is homicide in A. It certainly ought to be so considered. But how, on Mr. Livingstone's principles it can be so considered we do not understand. 'Homicide,' he says, must be operated by 'an act.' Where, then is the act in this case? Is it the speaking of A.?—Clearly not; for Mr. Livingstone lays down the doctrine that speaking is not an act. Is it the swallowing by Z.?—Clearly not; for the destruction of life, according to Mr. Livingstone, is not homicide unless it be by the act of another. And this swallowing is an act performed by Z. himself.

"The reasonable course, in our opinion, is to consider speaking as an act, and to treat A. as guilty of voluntary culpable homicide, if by speaking he has voluntarily caused Z.'s death, whether his words operated circuitously by inducing Z. to swallow poison, or directly by throwing Z. into convulsions.

"There will indeed be few homicides of this latter sort. It appears to us that a conviction, or even a trial in such a case, would be an event of extremely rare occurrence. There would probably not be one such trial in a century. It would be most difficult to prove to the conviction of any court that death had really been the effect of excitement produced by words. It would be still more difficult to prove that the person who spoke the words anticipated from them an effect which, except under very peculiar circumstances, and on very peculiar constitutions, no words would produce. Still it seems to us that both these points might be made out by overwhelming evidence; and supposing them to be so made out, we are unable to perceive any distinction between the case of him who voluntarily causes death in this manner and the case of him who voluntarily causes death by means of a pistol or a sword. Suppose it to be proved to the entire conviction of a criminal court that Z., the deceased, was in a very critical state of health, that A., the heir to Z.'s property, had been informed by Z.'s physicians that Z.'s recovery absolutely depended on his being kept quiet in mind, and that the smallest mental excitement would endanger his life; that A. immediately broke into Z.'s sick room, and told him a dreadful piece of intelligence which was a pure invention; that Z. went into fits, and died on the spot; that A. had afterwards boasted of having cleared the way for himself to a good property by this artifice: these things being fully proved, no judge could doubt that A. had voluntarily caused the death of Z.; nor do we perceive any reason for not punishing A. in the same manner in which he would have been punished if he had mixed arsenic in Z.'s medicine."

Art. 5.

It is homicide, although the effect of bodily injury be merely to accelerate the death of one labouring under some previous bodily injury, disorder or disease.

ART. 6.

It is homicide if the death be caused by bodily injury, although by proper remedies and skilful treatment, death might have been prevented.

ART. 7.

It is homicide, although through neglect or ill-treatment on the part of the injured person himself or some other, a disease or disorder, which is the immediate cause of the death, ensue from the original injury. (*e*)

(*e*) The authorities on this subject are not uniform, and the distinctions laid down are neither precise nor consistent. The principle of the law seems to be, that the responsibility of the party injuring is not diminished in consequence of contingencies which are of probable occurrence in like cases. The law of Scotland differs from our law in this respect. "If death be owing not to the natural and accustomed consequences of the injury, but to remote and improbable accidents, which have since intervened, the pannel must be acquitted. Thus if a person receive a slight injury, in itself by no means dangerous, but which, by his *obstinacy or intemperance*, or by rash and hurtful applications, degenerates in the end into a mortal sore, he is himself answerable for the fatal result, and the first injury was only the occasion of his deed." (Alison's Principles of the Criminal Law of Scotland, p. 147.) Doubts may be entertained whether the above Article should not be modified so as to exclude cases where the party injured by his own obstinacy or gross neglect accelerates death; but we do not feel justified in proposing an alteration of the existing law upon this point, seeing that practical danger might result if this plea were admitted. The case is not likely to be of frequent occurrence where a person obstinately resists or neglects his own cure, and if the plea were to be admitted, doubts would be raised upon every trial for homicide, whether the party killed had not neglected his own cure.

Upon this subject the Indian Law Commissioners (Note M. to their Penal Code) say "Mr. Livingstone excepts from the definition of homicide the cases of a person who dies of a slight wound which, from neglect, or from the application of improper remedies, has proved mortal. We see no reason for excepting such cases from the simple general rule which we propose. It will, indeed, be in general more difficult to prove that death has been caused by a scratch than by a stab that has reached the heart; and it will, in a still greater degree, be more difficult to prove that a scratch was intended to cause death than that a stab was intended to cause death; yet both these points might be fully established. Suppose such a case as the following:—It is proved that A. inflicted a slight wound on Z., a child who stood between him and a large property. It is proved that the ignorant and superstitious servants about Z. applied the most absurd remedies to the wound. It is proved that under their treatment the wound mortified, and the child died. Letters from A. to a confident are produced. In those letters A. congratulates himself on his skill, remarks that he could not have inflicted a more severe wound without exposing himself to be punished as a murderer; relates, with exultation, the mode of treatment followed by the people who have charge of Z., and boasts that he always foresaw that they would turn the slightest incision into a mortal wound. It appears to us that if such evidence were produced, A. ought to be punished as a murderer.

"Again, suppose that A makes a deliberate attempt to commit assassination. In the presence of numbers, he aims a knife at the heart of Z.; but the knife glances aside, and inflicts only a slight wound. This happened in the case of Jean Chatel, of Damien, of Guiscard, and of many other assassins of the most desperate character. In such cases there is no doubt whatever as to the intention. Suppose that the person who received the wound is under the necessity of exposing himself to a moist atmosphere immediately afterwards, and that, in consequence, he is attacked with tetanus, and dies. Here, again, however slight the wound may have been, we are unable to perceive any good reason for not punishing A. as a muderer."

ART. 8.

It is homicide, although the death be not directly caused by the injury done, nor, as is mentioned in the last preceding Article, by a disease or disorder ensuing from such injury, but by some distinct bodily injury, disease or disorder, resulting from the treatment of the original injury, provided the injury, disease or disorder resulting therefrom were not negligently caused within the meaning of Article 5 of Section 2 of Chapter I. of this Act. (*f*)

(*f*) There are many nice and difficult questions as to the legal connexion between an injury received and supervening death, where the original injury is, by aggravation, heightened into the cause of death, so as that the immediate cause of death may be regarded as a modification of the original injury, though in some respects its character may be different, and it may be known by a different name; as where, by neglect or ill-treatment, the original injury turns to a gangrene, or produces a fever. In these cases it is admitted that the perpetrator of the injury has been guilty of homicide, notwithstanding there has been neglect or ill-treatment, and although under better treatment the injured man might probably have recovered: cases of this nature are provided for in the last preceding Article.

It appears to the majority of your Commissioners, also, that in cases where, in consequence of an injury, the sufferer is treated with reasonable care, although death be occasioned by the treatment received, and is not produced by any aggravation of the original injury, yet, that it is homicide by the person who caused that injury. A person receiving an injury must be expected, by natural consequence, to avail himself of treatment for it; and although such treatment be applied with reasonable caution, and may offer the only probable means of preserving life, it may not unfrequently, in the ordinary course of events, be attended with fatal consequences. In cases of this description, the majority of your Commissioners conceive that there is such a proximate connexion between the original injury and the fatal result, as justly to render the perpetrator of the injury answerable for that result.

But in cases of negligent treatment, where reasonable caution has not been used, and the person administering such treatment would be criminally responsible for negligence, the majority of your Commissioners are of opinion that the person who inflicts an injury ought not to be responsible, if the disease or disorder which occasions death cannot properly be considered to have ensued from the original injury, and to be an aggravated consequence of it, but is solely attributable to the criminal negligence.

SECTION 2.

Murder.

ART. 1.

WHOSOEVER shall be guilty of Murder shall suffer death.

ART. 2.

Homicide is murder whensoever the killing is wilful, and is neither extenuated within the provisions of Section 3, nor justifiable within the provisions of Section 5 of this Chapter. (*a*)

(*a*) The definitions of murder, according to the English law, are open to many objections, which have been pointed out by Mr. Livingstone and other writers. The reasons given for the definition suggested by Mr. Livingstone, in his Code of Crimes and Punishments, so fully explain the advantages of our mode of defining murder, which in principle is the same as his, but more concise, that we cannot do better than insert his observations in recommending his definition to the attention of the Legislature of Louisiana. He says, "The particular attention of the Legislature is called to the definition of this crime in the new code, and it is earnestly desired that every word of it may be weighed, and that it may be contrasted with the description of it given by our present law, and that the one may be sanctioned which is the most clear and explicit, and which requires the least reference to other sources for understanding it. By the code it is thus described:—'Murder is homicide inflicted with a premeditated design, accompanied by any of the circumstances which, according to the previous provisions of this Chapter, do not justify, excuse, or bring it within some one of the descriptions of homicide hereinbefore defined.' This description was, as the projected code was first printed, contained in two Articles. The sense was precisely the same, but the amendment consolidated and made it more concise, and was therefore preferred. If, then, a clear idea in the preceding parts of this Chapter has been given of the other descriptions of homicide, there can be no difficulty in forming one of this that is not liable to error. An act of homicide occurs. Did the circumstances justify it? Did they excuse it? Does it come within any of the descriptions of negligent homicide? Is it manslaughter? If either of these questions be answered in the affirmative, it cannot be murder. The advantage of this mode of description over that of a simple definition is evident; for should any words contained in that definition be liable to misconstruction, an act properly coming within the lower degree of that offence might be brought within the definition of the higher. The act of taking human life is the same in all. The attention should, therefore, if we mean to avoid error, be drawn to all the circumstances that would bring the act into a lower degree of offence before we inflict the punishment due to the highest; and if the law should be so framed as to oblige those who administer it to make this examination, by the new code no jury can convict, no judge can condemn for murder, until they have carefully examined all the lighter shades of homicide, and are convinced that the circumstances of the case do not bring the accused within any of them. The form of the law imposes this obligation; it cannot be dispensed with, for there is no other description of the crime of murder than that it is homicide that is not one of those before described. Now take the English description of the same crime, and see whether the same result is produced. Coke's description of the crime is the one most generally sanctioned by decisions and commentators. It is this: "When a person of sound memory and discretion unlawfully killeth any reasonable creature, in being, and under the King's peace, with malice aforethought, either express or implied." Now suppose a jury impanelled to try an indictment for murder, and after the circumstances of the case have been detailed by the evidence, this description is read to them, and they are directed by the Court, under the sanction of their oaths, to apply it to the case, there is scarcely a word in it that, to a conscientious man, will not afford matter for serious doubt. The perpetrator must have been of *sound memory* and *understanding*. What a scope does this give for equivocation! What a field does it open for inquiry! What has the soundness of memory to do with the act? Be the faculty ever so imperfect, how does it affect the guilt? And as to discretion, if a sound discretion were necessary to constitute guilt, no one could be guilty; for surely he commits the highest indiscretion who takes away the life of another and exposes his own to consequences of detection and punishment. The killing must be also *unlawful*. Here we have one of the features of the description contained in the code, but without the faculty which it affords of determining, by a reference to a few preceding pages, whether the killing be lawful. The person killed, to constitute the crime, must be a reasonable creature; neither a new-born infant, nor an idiot, nor a madman, nor one suffering in the delirium of a fever, or stupified by opium or liquor, comes within this part of this description according to the plain meaning of the words. Again, who is in the King's peace? What is malice aforethought? Is there any malice that is afterthought? What is express malice? When shall it be implied? Thus we find that there is scarcely a word in the description of a crime so important to be known that will not raise at least a doubt in the mind of a man of common understanding; and it would be difficult, perhaps, to prove any description of the crime which would sufficiently give us to understand its precise meaning, without a reference to the definitions of those homicides which were not included in it. I am certainly aware that most of these terms have been expounded by commentators, and illustrated by decisions, and that a recourse to these sources of information would teach us what construction the best lawyers and judges have put upon them, but still the evil recurs. There is no source to which we can look for the absolute certainty on which the conscience of a juror ought to rest, who is sworn to decide, and the definition given to him as the text of the law. He has a right to put the construction which his understanding adopts upon the doubtful words; and there are cases, too, in which the expositors to whom he is directed are not themselves agreed more particularly in what respects the construction of malice, express or implied,—the great pivot on which this definition turns,—and one of which it is so difficult to form a definite idea that I have purposely excluded it from the description of this offence in the Code."

ART. 3.

Bearing false witness with intent to destroy the life of any person, by reason

whereof such person suffers death by the sentence of the Law, shall not be deemed to be murder. (*b*)

(*b*) There appear to be strong grounds for apprehending that this is murder by the law of England, as it is by several other codes. A very remarkable instance occurred in this country of a prosecution for this offence (see R *v.* M'Daniel and others, Fost. 131, 1 Leach, 44), which was abandoned by the Attorney-General. It seems most probable that this abandonment was in consequence of an apprehension entertained, lest the fear of capital punishment for murder by a malicious prosecution should deter true witnesses from coming forward to support a prosecution for murder. See 4 Black. Comm., p. 196, in the note, where Mr. Just. Blackstone says that he had good grounds for such an opinion, and that nothing should be concluded from the waiving of that prosecution. The act seems to be attended with many of the bad consequences, and to have the general features of a murder of the most malignant description. It may be thought, however, that no very strong or general apprehensions can be entertained of life being taken away by such means, and that very great difficulty would occur in obtaining a conviction for the offence; and, moreover, the reasons above supposed to have influenced the Attorney-General in M'Daniel's case are not altogether without foundation. Under these circumstances, and regarding the severe penalties for perjury, and the general difficulty of procuring convictions in capital cases, the Commissioners are disposed to propose the rule stated in the text. The crime will, however, be provided for in the Chapter of the Digest relating to offences against the administration of justice.

"In Scotland there seems to be no authority for holding that such an offence, how great soever and however punishable as perjury or conspiracy, could be made the subject of capital punishment."—(Alison's Principles of the Criminal Law of Scotland, p. 73.)

This offence is punishable with death by the Bavarian Code, Art. 292; and by the Prussian Code, Art. 1412 and 1413; and by the Indian Code, Art. 294, it is classed under the head of "Murder."

The following are the provisions of the Bavarian and Prussian Codes.

Bavarian.—Art. 292.—"If an innocent person has been punished with death, in consequence of the false and perjurious testimony of several persons, the perjurers who have conspired together to give such false testimony, and also the person by whom the false witnesses were suborned, shall be punished with death."

Note.—In the scheme for a new code, published in 1822, this Article was omitted.

Prussian.—Art. 1412.—"Whosoever in a criminal inquiry has, by giving false testimony upon oath, occasioned an innocent person to be punished, shall undergo the ordinary punishment of perjury, increased in proportion to the injury inflicted on the innocent person (see Art. 1405); and, if the case shall happen, even to the punishment of death."

Art. 1413.—"When several persons agree among themselves to give false evidence, the punishment which would be applicable in case of simple false testimony shall be increased; and if a man shall have lost his life by such false evidence, the offenders shall suffer the punishment of the wheel from below (von unten).

SECTION 3.

Extenuated Homicide.

Art. 1.

Whosoever shall be guilty of extenuated homicide, shall, except as is hereinafter mentioned in Article 16 of this Section, incur the penalties of the 4th class. (*a*)

(*a*) See 9 Geo. IV., c. 31, s. 9.

Art. 2.

Homicide is extenuated whensoever the killing is wilful and not justifiable, but the act from which death results is attributable to want of self-control, occasioned by an impulse of passion, fear or alarm, arising from sudden and grave provocation offered by the party killed, which, for the time suspends the power of self-control. (*b*)

(*b*) By the present law, the most grievous words of reproach, contemptuous and insulting actions or gestures, or trespasses against lands or goods, will not free the party killing from the guilt of murder, if upon such provocation he make use of a deadly weapon, or otherwise manifest an intention to kill, or to do some grievous bodily harm. (Foster Disc. II. of Homicide, c. 5, s. 1, & c. 8, s. 12.) But if he use a weapon not likely to kill, or give the party killed a box on the ear merely, and unluckily and against his intention kill him, it will be manslaughter only.—*Ibid.* It is doubtful whether words of menace of bodily harm are a sufficient provocation to extenuate homicide. In Lord Morely's case (1 Hale, 455) they are said to have been held to be so, but though the same case is mentioned in Kelyng, p. 55, no such position is there stated; but if they are, it has been considered that they ought to be accompanied by some act denoting an immediate intention to follow them up by an actual assault. (1 East's P. C. c. 5, s. 20, p. 233.) These rules appear to us to be unreasonable, when the principle is considered upon which extenuation is admissible, viz.: the want of self-controul occasioned by means which, according to the constitution of human nature, ordinarily produce this effect.

The reasoning of the Indian Law Commissioners on the subject seems to be very deserving of attention. They say, "We agree with the great mass of mankind, and with the majority of jurists, ancient and modern, in thinking that homicide committed in the sudden heat of passion, on great provocation, ought to be punished, but that in general it ought not to be punished so severely as murder. It ought to be punished in order to teach men to entertain a peculiar respect for human life; it ought to be punished in order to give men a motive for accustoming themselves to govern their passions; and in

some few cases for which we have made provision, we conceive that it ought to be punished with the utmost rigour.

"In general, however, we would not visit homicide committed in violent passion, which had been suddenly provoked, with the highest penalties of the law. We think that to treat a person guilty of such homicide as we should treat a murderer would be a highly inexpedient course—a course which would shock the universal feeling of mankind, and would engage the public sympathy on the side of the delinquent against the law.

"His Lordship in council will remark one important distinction between the law as we have framed it and some other systems. Neither the English law nor the French code extends any indulgence to homicide which is the effect of anger, excited by words alone. Mr. Livingstone goes still further. 'No words whatever,' says the Code of Louisiana, 'are an adequate cause, no gestures merely showing derision or contempt, no assault, or battery, so slight as to show that the intent was not to inflict great bodily harm.'

"We greatly doubt whether any good reason can be assigned for this distinction. It is an indisputable fact that gross insults by word or gesture have as great a tendency to move many persons to violent passion as dangerous or bodily injuries; nor does it appear to us that passion excited by insult is entitled to less indulgence than passion excited by pain. On the contrary, the circumstance that a man resents an insult more than a wound is anything but a proof that he is a man of a peculiarly bad heart. It would be a fortunate thing for mankind if every person felt an outrage which left a stain upon his honour more acutely than an outrage which had fractured one of his limbs. If so, why should we treat an offence produced by the blameable excess of a feeling which all wise legislators desire to encourage more severely than we treat the blameable excess of feelings certainly not more respectable?

"One outrage which wounds only the honour and the affections is admitted by Mr. Livingstone to be an adequate provocation. 'A discovery of the wife of the accused in the act of adultery with the person killed is an adequate cause.' The law of France, the law of England, and the Mahomedan law are also indulgent to homicide committed under such circumstances. We must own that we can see no reason for making a distinction between this provocation and many other provocations of the same kind. We cannot consent to lay it down as an universal rule, that in all cases this provocation shall be considered as an adequate provocation. Circumstances may easily be conceived which would satisfy a court that a husband had in such a case acted from no feeling of wounded honour or affection, but from mere brutality of nature, or from disappointed cupidity. On the other hand, we conceive that there are many cases in which as much indulgence is due to the excited feelings of a father, or a brother, as to those of a husband. That a worthless, unfaithful and tyrannical husband should be guilty only of manslaughter for killing the paramour of his wife, and that an affectionate and high-spirited brother should be guilty of murder for killing, in a paroxism of rage, the seducer of his sister, appears to us inconsistent and unreasonable."

It appears to us that the principle of extenuated homicide, being ascertained to be the loss of self-control arising from that human infirmity which is so general and almost universal as to render it proper to make allowance for it in admeasuring punishment, it is expedient to leave the consideration of this subject to juries, unfettered by arbitrary distinctions. According to the present law, there is some uncertainty as to the distinct provinces of the judge and jury in such cases; and the rules and opinions above adduced show that a jury are precluded from considering whether particular circumstances of various kinds have tended to that loss of self-control which is natural to humanity. Some of these rules not unfrequently deny the benefit of extenuation in the very cases where human infirmity is most severely tried. It may be thought that there is the less danger of leaving to juries the application of the principle of law, which is a very plain one, as they may not be expected to take too lenient a view of an action which has occasioned the loss of life. At present, juries are often tempted to bring cases which manifestly fall within the principle of extenuation, also within the rule of it, by strained presumptions of fact or direct violations of their oaths.

It has been thought by some jurists that the criterion in these cases ought to be, what would take away the self-control of a person of *ordinary* temper. But we have thought it better to abide by the present law, according to which the circumstances of the individual accused are relevant to the question of extenuation.

The following are the provisions of the French code on the subject of the provocations which extenuate or, to use the French term, render *excusable* homicide when wilfully committed. Wilful homicide, in the French code, is called "meurtre." What is termed murder by the English law, in the French code, is denominated "Assassinat:"—

Art. 321. "Le meurtre ainsi que les blessures et les coups sont excusables, s'ils ont été provoqués par les coups ou violences graves envers les personnes."

Art. 323. "Le parricide n'est jamais excusable."

Art. 324. "Le meurtre commis par l'époux sur l'épouse, ou par celle ci sur son époux, n'est pas excusable, si la vie de l'époux ou de l'épouse qui a commis le meurtre n'a pas été mise en péril dans le moment même où le meurtre a eu lieu. Néanmoins, dans le cas d'adultère, prévu par l'Article 336, le meurtre commis par l'époux sur son épouse, ainsi que sur le complice, à l'instant où il les surprend en flagrant délit dans la maison conjugale, est excusable."

Art. 325. "Le crime de castration, s'il a été immédiatement provoqué par un outrage violent à la pudeur, sera considéré comme meurtre ou blessures excusables.

Art. 326. "Lorsque le fait d'excuse sera prouvé:

S'il s'agit d'un crime emportant la peine de mort, ou celle des travaux forcés à perpétuité, ou celle de la déportation, la peine sera réduite à un emprisonnement d'un an à cinq ans;

S'il s'agit de tout autre crime, elle sera réduite à un emprisonnement de six mois à deux ans;

Dans ces deux premiers cas, les coupables pourront de plus être mis par l'arrêt ou le jugement sous la surveillance de la haute police pendant cinq ans au moins et dix ans de plus.

S'il s'agit d'un délit, la peine sera réduite à un emprisonnement de six jours à six mois."

Art. 3.

Homicide is extenuated, although the offender by mistake or accident kills not the person who offered the provocation, but some other person.

ART. 4.

Whether such provocation, as is mentioned in the last two preceding Articles, existed, and whether, at the time of doing the act from which death results, the passion, fear, or alarm, occasioned by such provocation, continued in force, are questions of fact.

ART. 5.

Homicide is not extenuated where the offender either seeks the provocation as a pretext for killing or for doing grievous bodily harm, (*c*) or where he endeavours to kill or to do grievous bodily harm, whereupon provocation is given.

(*c*) Some cases are hereby provided for, which any lawyer, and most persons of intelligence, would perceive, were obviously deducible from the rule laid down in Art. 2. They are, in fact, only particular applications and illustrations of that rule; but as the matters to which they relate are of frequent occurrence, and have been the subjects of numerous legal decisions, it has been thought expedient to make special provision for them. See Mason's case and other cases, 1 Russ. (by Greaves), pp. 520, 521.

ART. 6.

Homicide is not extenuated, notwithstanding anything in Article 2 of this Section contained, where an officer or other person lawfully executing any writ, warrant or process, civil or criminal, or lawfully acting in obedience to the command of a magistrate or otherwise lawfully acting under authority for the advancement of the law, or lawfully interposing for the prevention or suppression of any offence, is wilfully killed, if the party killing had notice that such officer or other person purposed to act under the authority of such writ, warrant or process, or in obedience to such command or otherwise for the advancement of the law, or interposed for such purpose as aforesaid, or although the party killing had no such notice, if upon resistance unlawfully made to any such officer or other person, he unlawfully interposed, and took part against such officer or other person. (*d*)

(*d*) It is an important subject to consider whether any exceptions from general rules regarding the killing under provocation, or for the defence of person or of property, should be allowed for the purpose of protecting officers of justice.

It is generally admitted that where there may be objections to the process under which officers are professing to act, yet if these objections are not apparent on the face of the process, if there be no defect in the frame of it, none of the rules for the justification or extenuation of homicide or other injuries apply in favour of a person resisting officers; but some uncertainty prevails as to what is to be deemed a defect in the *frame* of process. Some writers state that a mistake in the *addition* of a party to be apprehended under a warrant is a mistake in the frame of the warrant. (1 Hale, 457; Hawk. P. C. b. i., c. 31, s. 64; Foster, 312; 1 East's P. C., c. 5, s. 78; Sir Henry Ferrer's Case, Cro. Car. 371.) On the other hand, it is held that an offence for which a party is to be apprehended under a warrant need not be expressed with the same certainty as an indictment.

Supposing a mistake in the frame of a warrant, four questions may arise touching resistance to the execution of it. 1. The party arrested may, from the provocation, lose the control of his temper and kill the officer. 2. The party arrested, using no more force than was necessary to secure his own liberty, might, in doing so, kill the officer. 3. A bystander may interfere to assist the party arrested when that party is making resistance. 4. Such interference may take place where the party arrested is making no resistance. In the books, moreover, are various other distinctions between particular relatives, relatives generally, masters and servants, friends, or strangers interfering.

It appears to us that where the officer is acting under a process delivered to him to execute, or in consequence of a criminal charge, and where he is known to be so acting, he requires peculiar protection; and this although person and property are illegally invaded, and although, in general cases, resistance to the illegal invasion of person or property is justifiable, and ignorance of law is not excusable.

It is to be considered that it is inexpedient to induce officers to question the process delivered to them by their superiors to execute; that where an arrest is by an officer of justice, the presumption is in favour of its legality; that in the present condition of society and state of the law, speedy liberation and redress may be anticipated when an arrest is unlawful. Officers are exposed to imminent hazard in arresting the class of persons who are charged with crimes. They are often compelled to act upon the information of others; they are liable to punishment or dismissal in case of escapes arising from excess of caution; and it is desirable that they should not be intimidated, nor the persons opposed to them be encouraged, by the consideration that an illegality in the frame of the process may possibly be discovered. The validity of process is, moreover, often a question of considerable legal difficulty. In the generality of cases on this subject officers have believed they were acting in execution of the law, and the persons resisting them did not at the time suppose otherwise, but purposely intended to violate the law in a forcible manner; and yet, on account of some technical objection to the validity of the process, the most malicious and barbarous attacks upon the officers have been extenuated or justified.

According to the Scotch law, as expounded by Mr. Alison, in his "Principles of the Criminal Law of Scotland," p. 25, "In resisting irregular or defective warrants, or warrants executed in an irregular way, or upon the wrong person, it is murder if death ensue to the officer by the assumption of lethal weapons, where no great personal violence has been sustained." Mr. Alison observes that the distinction between the English and Scotch law seems to be, that "The Scotch law reprobates the immediate assumption of lethal weapons in resisting an illegal warrant, and will hold it as murder if death ensue by such immediate use of them, the more especially if the informality or error were not known to the party resisting: whereas the English practice makes such allowance for the irritation consequent upon the irregular interference with liberty, that it accounts death inflicted under such circumstances as manslaughter only."

In R. *v.* Hood, 1 Mo. Cr. C. R. 281, where great barbarity was used towards an officer, the resistance was held not to be murder, because the warrant under which the officer acted omitted the Christian name of the party to be arrested. In R. *v.* Delaney, Jebb's Irish Cr. Ca. 88, violent resistance occasioning the death of an officer, was held to be manslaughter only, because the warrant was dated by mistake prior to the date of a writ upon which it was founded, an error which the officer could scarcely be expected to detect. In R *v.* Thompson, 1 Mo. Cr. C. R. 80, where a person had armed himself, and was not actually arrested, but had no means of escape, was held to be guilty of manslaughter only, on account of an informality in the process. It has been held, however, that although a charge be improperly expressed, as for passing a forged note without alleging that it was known to be forged, it does not render the proceeding so illegal as to extenuate the homicide of an officer; and although an officer has no warrant, and does not notify the charge upon which he arrests, yet, if he is known to be an officer by the party arrested, the homicide of the officer will not be extenuated. R. *v.* Woolmer, 1 Mo. Cr. C. R. 394.

Your Commissioners think that the requisites of the frame of process which ought to render such process sufficient, as regards the crime of homicide, require more precise definition. This, in their opinion, is necessary in order to determine the cases in which officers may be justified in committing homicide whilst executing process. But they are of opinion that homicide of officers should neither be justified nor extenuated, on the ground of any errors occurring in the frame of process, where an officer is executing process in good faith, and with a belief of its legality, and proper notice is given of the officer's capacity and purpose.

Your Commissioners also think that where an officer, believing that he is executing legal process, commits homicide, such homicide should, notwithstanding the process is erroneous in the frame of it, be extenuated. In such case, he will still remain liable to severe punishment; and for all injuries inferior to homicide, the officer acting under erroneous process will be punishable as any other individual.

The above Article, and Articles 7, 8, and 10 of this Section, together with Articles 5 and 14 of Section 5 of this Chapter, have been introduced in conformity with the above views. See Tooley's Case 2 Ld. Raymd. 1296, where it was held, by seven judges against five, that if one be imprisoned upon an unlawful authority, it is a sufficient provocation to all people, out of compassion, and much more where it is done under a colour of justice; and that where the liberty of the subject is invaded, it is a provocation to all the subjects of England. But the five judges who differed thought that the party killed being, in the particular case, a stranger to the prisoners, it could not be a provocation to them; otherwise if the party had been a friend or servant; and that it would be dangerous to allow such a power of interference to the mob. We are inclined to concur generally in the view taken of this subject by the minority of the judges, sanctioned as it is by so eminent an authority as Mr. Justice Foster (See Disc. II. of Homicide, c. 8, s. 10.) In R. *v.* Warner, R. & M. C. C. R., 385, Mr. Bar. Alderson said that Tooley's Case had been overruled. In R. *v.* Foster, also, which is reported as to another point, (9 Car. and P. 778,) upon an indictment for murder, in opening the case, it was asserted, without being controverted either by the judge or prisoner's counsel, that if a person were illegally in custody, and was making no resistance, no person had any right to attack the persons who had him in custody, and that if they did, and death ensued in consequence of the violence used to release the prisoner, it was murder; and that although there might be old cases to the contrary, they were no longer considered as binding authorities. The point, however, did not ultimately become material.

Art. 7.

Whensoever the killing of an officer or other person is not extenuated within the meaning of the last preceding Article if such officer or other person be lawfully executing any writ, warrant or process, civil or criminal, or if such officer be lawfully acting in obedience to the command of a magistrate, or be otherwise lawfully acting under authority for the advancement of the law, it is not extenuated, although such writ, warrant or process be not sufficient in law, or such command be unlawful, or such officer have no such authority as aforesaid, or the manner of executing such writ, warrant, process, command or other authority be unlawful, provided such officer or other person believed himself to be respectively lawfully executing such writ, warrant or process, or lawfully acting in obedience to such command or otherwise under authority for the advancement of the law; and provided the party killing had notice that such officer or other person proposed to act under the authority of such writ, warrant or process, or in obedience to such command or otherwise for the advancement of the law.

Art. 8.

Homicide is extenuated where an officer or other person believing himself to be lawfully executing any writ, warrant or process, civil or criminal, or where an officer, believing himself to be lawfully acting in obedience to the command of a magistrate, or to be otherwise lawfully acting under authority for the advancement of the law, although in fact such writ, warrant or process be not sufficient in law, or such command be unlawful, or such officer have no such authority as aforesaid, or the manner of executing such writ, warrant, process, command or other authority be unlawful, is forcibly resisted, and using no more force than is necessary to overcome such resistance, kills the person so resisting, or, being by reason of the violence opposed to him under reasonable fear of death if he proceed to execute that which he believes to be his duty, and because he has reasonable cause for believing that he cannot otherwise execute that which he believes to be his duty and preserve his life, kills him who so resists, provided

the party killed had notice that such officer or other person purposed to act under the authority of such writ, warrant or process, or in obedience to such command or otherwise for the advancement of the law.

ART. 9.

The rules contained in the last three preceding Articles are to be understood as explained by Articles 4 and 5 of Section 5 of this Chapter.

ART. 10.

Homicide is not extenuated, notwithstanding anything in Article 2 of this Section contained, where an officer or other person has made an arrest, believing himself to be lawfully authorized to make it, although such arrest be unlawful, if any person interpose, and take part against such officer or other person and kill him, provided the party arrested was offering no resistance to the arrest at the time of such interposition, and the party killing had notice that such officer or other person purposed to act under the authority of any writ, warrant or process, civil or criminal, or in obedience to the command of a magistrate or otherwise for the advancement of the law.

ART. 11.

The notice intended, by Articles 6, 7, and 8 of this Section, and the last preceding Article, is such notice as by Section 5 of this Chapter is made essential to the justification of killing, by officers and other persons acting for the advancement of the law.

ART. 12.

Homicide is extenuated where, upon a sudden quarrel, parties fight in heat of blood and one of them is killed, if the killing be attributable to want of self-control caused by heat of blood and passion. (*e*)

(*e*) This Article is perhaps not absolutely necessary, but as the cases to which it applies are of frequent occurrence, and as the rule contained in the next succeeding Article is important, and has reference to it, we have thought it expedient to retain it.

ART. 13.

In such case it is immaterial which of the parties offered the first affront or made the first assault.

ART. 14.

Homicide is extenuated whensoever the killing is wilful and not justifiable, but the act from which death results was done or the act from the omission of which death results was omitted at the request, or with the consent of the party killed. (*f*)

(*f*) This subject will be more fully considered in adverting to the Articles regarding *duelling*. We think that homicide by consent ought to be extenuated, not on the ground that "*volenti non fit injuria*," which maxim, we conceive, ought to be limited in criminal cases, where life is sacrificed; but we consider that, in cases of homicide by consent, circumstances are wanting which are the principal grounds for punishing murder with *death*; viz., the alarm which murder spreads in society, and the inability of individuals to protect themselves against this species of injury. The observations on this subject of the Indian Law Commissioners appear to us to have great weight.

"It appears to us," they say (Note M. to their Penal Code) "that this description of homicide ought to be punished, but that it ought not to be punished so severely as murder." They then proceed:—"Our reasons for not punishing it so severely as murder are these:—In the first place, the motives which prompt men to the commission of this offence are generally far more respectable than those which prompt men to the commission of murder. Sometimes it is the effect of a strong sense of religious duty, sometimes of a strong sense of honour, not unfrequently of humanity. The soldier who, at the entreaty of a wounded comrade, puts that comrade out of pain; the friend who supplies laudanum to a person suffering the torment of a lingering disease; the freed man who in ancient times held out the sword that his master might fall on it; the high-born native of India who stabs the females of his family at their own entreaty, in order to save them from the licentiousness of a band of marauders, would, except in Christian societies, scarcely be thought culpable, and even in Christian societies, would not be regarded by the public, and ought not to be treated as assassins.

"Again, this crime is by no means productive of so much evil to the community as murder. One evil ingredient of the utmost importance is altogether wanting to the offence of voluntarily culpable homicide by consent. It does not produce general insecurity. It does not spread terror through society. When we punish murder with such signal severity, we have two ends in view. One end is, that people may not be murdered: another end is, that people may not live in constant dread of being murdered. This second end is, perhaps, the more important of the two. For if assassination were left unpunished, the number of persons assassinated would probably bear a very small proportion to the whole population. But the life of every human being would be passed in constant anxiety and alarm. This property of the offence of murder is not found in the offence of voluntary culpable homicide by consent. Every man who has not given his consent to be put to death, is perfectly certain that this latter offence cannot at present be committed on him, and that it never will be committed, unless he shall first be co inced that it is his interest to consent to it. We know that two or three midnight assassinations are sufficient to keep a city of a million of inhabitants in a state of consternation during

several weeks, and to cause every private family to lay in arms and watchmen's rattles. No number of suicides, or of homicides committed with the unextorted consent of the person killed, could possibly produce such alarm among the survivors.

"The distinction between murder and voluntary culpable homicide by consent has never, as far as we are aware, been recognized by any code in the distinct manner in which we propose to recognize it. But it may be traced in the laws of many countries, and often when neglected by those who have framed the laws, it has had a great effect on the decisions of the tribunals, and particularly on the decisions of tribunals popularly composed. It may be proper to observe that the burning of a Hindoo widow by her own consent, though it is now, as it ought to be, an offence by the regulations of every presidency, is in no presidency punished as murder."

Art. 15.

Provided that Homicide shall not be extenuated within the meaning of the last preceding Article, where the party killed is in a state of idiotcy, or is by reason of unripeness or weakness of mind, or of any unsoundness, disease or delusion of mind, or of passion incapable of discerning the nature and consequences of his consent; or where such consent is extorted by the party killing; or where the party killing has reasonable cause for believing that such consent is given, in consequence of some false impression in respect of facts on the part of the person killed at the time of his giving such consent.

Art. 16.

Homicide is extenuated where, if two persons deliberately agree to fight, a contest ensues, and one of them is killed: Provided that if such contest be with deadly weapons, the party killing shall incur the penalties of the 2nd class. (*g*)

(*g*) The subject of the punishment of duelling has been so much discussed by jurists and moral writers that we think it necessary to advert but briefly to some of the principal arguments that seem to us to justify a change in the present law.

An evil ingredient in the crime of murder of great importance is wanting to the offence of duelling: death by duelling does not, like murder, spread alarm through all ranks of society, from the highest to the lowest. The grounds on which the extreme measure of capital punishment, in cases of murder, seems justifiable, are, first, to prevent the severest of personal injuries, and secondly, to prevent people from living in constant dread of being murdered. It is obvious that, in the case of duels, the danger is confined only to the higher class of society; and what is of more consequence, no one need be in dread of dying by such means, unless he chooses to enter into a voluntary compact to violate the law. As the punishment for murder is not grounded on the Jewish law, nor on our moral or religious horror at the act, but on its prejudice to society, and chiefly on the insecurity and alarm it occasions, it appears to us that there is not an adequate cause to justify the taking away of life, where death occurs in the instance of two persons voluntarily agreeing, according to certain stipulated or implied rules, to give each other an opportunity of killing his antagonist.

It seems to us that the present law is shown to be ineffectual in repressing the practice, and that its effect is to afford immunity to duellists: thus Mr. Alison, in his "Principles of the Criminal Law of Scotland," observes, that "such has been the natural and human sympathy both of Courts and Juries, with the alternative to which the best men are often reduced, of fighting a duel, or losing their place in society, that there is hardly an instance, for a long period, on our records of a capital sentence being pronounced on such a charge, if there was nothing savage or dishonourable in the conduct of the accused." And after mentioning by name a variety of cases in which fatal duels had been fought, and in which the Judges had laid down the law, that death by duelling was no other than murder, says that nevertheless "successive verdicts of 'not guilty' were delivered by juries."

Mr. Livingstone observes of the punishment of duelling:—"That practice, in modern times, seems to have proved how inefficient are all laws when opposed to public opinion, and to what degree the fear of shame will prevail over that of punishment. In the whole scope of criminal legislation there is no subject which presents greater difficulties: severe penalties have been denounced against it in vain; and it is the more difficult to be eradicated, because it prevails most where courage, a fear of disgrace, and a sense of personal dignity are most perfect."

And again, "The same false sentiment of honour which leads to a breach of the laws in committing this offence renders its punishment more difficult. Witnesses avail themselves of the principle, that they cannot be compelled to justify anything that may inculpate themselves; and, therefore, neither seconds nor surgeons, nor any others who were voluntarily present, can be induced to testify; so that facts notorious to the world, published in every newspaper, which must be known and understood in order to exonerate the parties from the foul crime of assassination, and which, therefore, they cannot wish to keep secret, can rarely be proved before a Court of Justice."

In Eden's Principles of Criminal Law, it is stated:—"I have not found any case of an actual execution in England in consequence of a duel fairly fought."

The reluctance of witnesses and juries to take any part in the capital conviction of a person, who has been engaged in a fair duel, especially if he may have received grievous provocation, or been the party challenged, must have been manifest to persons who have been present at trials of this description. And there have not been wanting examples of persons of high station and character tending to diminish the public odium of the offence of duelling.

We are, for these reasons, of opinion, that, by abolishing the capital punishment in cases of duelling, not only will a just objection be removed from the law of punishing the offence with death, without due discrimination between that offence and other cases of murder, but a great stigma in our criminal jurisprudence will be taken away, that of leaving a very serious injury to society unrepressed, by reason of affixing a punishment for it which it is found generally impracticable to put into execution.

The following are the provisions of the Austrian Code on the subject of Duelling:—

Art. 140.—"Whosoever, for any cause whatsoever, shall call out any person to a contest with deadly

weapons, and whosoever upon such calling out, shall engage in such contest, commits the crime of duelling."

Art. 141.—"This crime, even though followed by no result, shall be punished with heavy imprisonment for a period not exceeding five years nor less than one year."

Art. 142.—"If a wounding occurs in the duel, the judgment shall be heavy imprisonment for a period not exceeding ten nor less than five years."

Art. 143.—"If the death of a party results from the duel, the slayer shall be punished with heavy imprisonment for a period not exceeding twenty nor less than ten years; but the body of the party slain, if left dead upon the spot, shall be removed in charge of the police to a place situated outside of the usual burial-place, and there put in the ground."

Art. 144.—"In every case the challenger is to be more severely punished than the challenged, and consequently he is to be sentenced to a longer term of imprisonment than would have been his sentence had he been the challenged."

Art. 145.—"Whosoever has in any manner abetted a challenge, or the acceptance thereof, or has threatened or declared contempt for any person who has endeavoured to refuse a challenge, is to be punished with simple imprisonment for a period not exceeding five years nor less than one year; but if his influence has been specially important, or if wounding or death has ensued, he shall be punished with heavy imprisonment for a period not exceeding five years nor less than one year."

Art. 146.—"Those who have taken part in a duel as abettors, or so-called seconds, to either of the combatants, shall be sentenced to heavy imprisonment for one year; or according to the greatness of their influence, or of the resulting mischief, may be sentenced to heavy imprisonment for any period not exceeding five years."

Art. 17.

Homicide is not extenuated in the case of any such contest as in the last preceding Article is mentioned where the death of the person killed is caused in consequence of any unfair advantage taken, or any unfair means used, by the party killing. (*h*)

(*h*) The case of treacherously killing in a duel, where the party killed cannot be deemed concurrent in producing his own death, unless indirectly and remotely, we propose to leave under the present provisions of the law. By the present law, cases of homicide which would otherwise have been manslaughter only, amount, where undue advantage is taken or unfair means are used, to murder. As for instance, where parties fight upon a sudden quarrel, and one of them is killed, this is murder, if the party killing sought or took any *undue advantage*, otherwise it is manslaughter only. (Foster, Disc. II., c. 5, s. 3.) In the same Section, also, Mr. Just. Foster, speaking of a fight upon a sudden quarrel, where one of the combatants is killed, says, "This is holden to be manslaughter, for it was a sudden affray and they fought upon *equal terms*." In Whiteley's Case (1 Lew. 173), where a party was killed in a sudden affray, Mr. Justice Bayley told the jury, "If a party enters a contest dangerously armed, and fights under an *unfair advantage*, though mutual blows pass, it is not manslaughter, but murder." And although even this case may not appear to be attended with alarming circumstances to the same extent as other murders, yet it is apprehended that the punishment of death in such cases would not be followed by the stifling of prosecutions, or the acquittals of juries by any means to the like extent, as is the case, according to the experience of the criminal annals of this country, and (as appears from the opinions we have cited) according to the experience of the Scotch and American tribunals, with the punishing with death duellists under all circumstances.

SECTION 4.

Negligent Homicide.

Art. 1.

Whosoever shall be guilty of negligent Homicide shall incur the penalties of the 7th class.

Art. 2.

Homicide is negligent whensoever death is not wilfully caused, but results from want of reasonable caution, as is hereinbefore in Article 5 of Section 2 of Chapter I. defined. (*a*)

(*a*) As where a person, whether a regular licensed medical man or not, from want of competent skill or gross carelessness or inattention, causes the death of a person whose life or health he takes upon himself to deal with.—(R. *v.* Williamson, 3 Car. and P. 635; R. *v.* Van Butchell, 3 Car. and P. 629; R. *v.* St. John Long (first case), 4 Car. and P. 398; (second case) ib. 423; R. *v.* Spiller, 5 Car. and P. 333; Ferguson's Case, 1 Lewin, 181; R. *v.* Spilling, 2 M. and Rob. 107; R. *v.* Webb. 1 M. and Rob. 405.

It was formerly holden, however, that if a person not duly authorized to act as a physician or surgeon undertook, at all, a cure, and the patient died under his hand, he was guilty of felony; but Mr. Serjeant Hawkins observes (Pl. of the Crown b. 1, c. 31, s. 69), it may be well questioned whether such killing shall be said to be of malice prepense within the meaning of the statute 23 Hen. VIII., c. 1, which first excluded such felonious killing as may be called wilful murder of malice prepense from the benefit of clergy. Lord Hale also says that the doctrine is "apochryphal," though it may "have its use," and may "serve to caution ignorant people."

Another class of cases within the above Article, are those where persons in the exercise of their occupations, or in the performance of lawful acts, especially such from which danger may probably arise, do not use a reasonable degree of caution; as where workmen throw stones, rubbish, or other things, from a house in the ordinary course of their business, without looking out and giving timely warning

to those below, and a person underneath happens to be killed thereby (Foster, Disc. II. c. 1, s. 4). In London or other populous towns, such warning even, it seems, would not excuse, unless, perhaps, early in the morning (Kelyng, 40; Foster, Disc. II. c. 1, s. 4).

The above Article will also include the case of a person who strikes another with his fist or some instrument not likely to kill, and kills him, but without intending to do so. The principle upon which such an act is made punishable, although the death of the party was neither intended nor were means used likely to kill, is that the act was unjustifiable, and done without reasonable caution. See Rowley's case, where the father of a boy who had fought and been beaten by another boy, took a staff, and beat the latter, who died of the beating. This, according to Lord Coke, (12 Rep. 87,) was ruled manslaughter, *because done in sudden heat and passion:* but Mr. Just. Foster (Disc. II. c. 5, s. 2) thinks that the report of the same case, in Cro. Jac. 296, gives the true grounds of the judgment, viz., that Rowley struck the child with *a small cudgel*, of which *stroke he afterwards died.* He also observes that Lord Raymond lays great stress on the circumstance that *the stroke was with a cudgel not likely to kill.*

It has also been held that where a man having found a pistol in the street, which he had reason to believe was not loaded, *having tried it with a rammer*, carried it home and showed it to his wife, and she standing before him, he pulled up the cock and touched the trigger, and the pistol went off and killed her, that this was manslaughter, (Kelyng, 41); but Mr. Just. Foster thinks that this case is not law, it not being necessary that a person should use the *utmost* caution that *can be* used, but only a reasonable precaution, such as is *usual and ordinary* in the like cases; and that the man in the case under consideration, having examined the pistol in the ordinary way, he ought to have been excused. (Fost., Disc. II. c. 1, s. 4.)

With regard to Mr. Starkie's observations regarding the exclusion of the rule, "Homicide is unlawful (and manslaughter) where the death is occasioned not wilfully, but in consequence of any unlawful violence or injury to, or endeavour to injure the person of any other," (see his note, p. 56, below), your other Commissioners have to observe that, if the death, though not wilful, was the result of negligence, then it is provided for by the above Article. If it was neither wilful nor negligent, then it was accidental, and is provided for as not being punishable. The rule of the former Commissioners would punish any one injuring or attempting to injure the person, as though he had committed manslaughter, notwithstanding homicide was not intended, nor wilful in the large acceptation of that term, nor resulted from negligence, but was purely accidental.

Art. 3.

Death shall be deemed to result from want of reasonable caution within the meaning of the last preceding Article, where it is caused not wilfully, but by any excess of violence beyond the limits permitted by the law, for the advancement of the law (*b*), or for the purpose of correction (*c*) the defence of person or property (*d*), or any other lawful purpose, either as regards the means used or the manner of using them.

(*b*) As where an officer, whose duty it is to execute a sentence of whipping upon a criminal, should exceed all bounds of moderation, and thereby cause the party's death. This would be manslaughter at least. (1 Hawk. P. C., c. 29, s. 5.)

(*c*) If the correction be immoderate or unreasonable, either in the measure of it, or in the instrument made use of for the purpose, as if a cudgel or other thing improper for the purpose of correction be used. But such thing must not be one likely to kill or do grievous bodily harm, as in that case the offence would amount to murder. (Fost., Disc. II., c. 1, s. 4.)

(*d*) As where the party whose person or property is attacked uses more violence than is reasonably necessary for the defence of his person or property.

With respect to Mr. Starkie's objection (see his note, p. 55, below), that a wilful excess would not fall within the rule contained in the above Article, and that a killing from wilful excess is not provided for unless not only the excess but the killing be wilful, your other Commissioners have to observe that, if the excess be wilful, as if a person authorized to give 10 lashes, gives 20 wilfully, he clearly would be punishable for the excess: whether he would be punishable for homicide would depend on the question whether homicide had any probable connexion with the act of the individual accused.

Art. 4.

Homicide is negligent whensoever death is not wilfully caused but occurs in any sport, exercise or amicable contest, if weapons, instruments or means be used which cannot be used without probability of causing grievous bodily harm. (*e*)

(*e*) This and the next Article concerning death occurring in the practice of sports, are immediately deducible from the general principles in regard to negligence and accident, of which they are only particular illustrations. These Articles are inserted, because they relate to matters of common occurrence, and have been the subject of many decisions and much comment by text writers, and because some uncertainty has been introduced into the law, in consequence of various distinctions with the nature of the sports in which death has occurred.

Art. 5.

Homicide is not negligent but accidental, where death occurs in any sport, exercise or amicable contest, without intent on either side to cause, and without using weapons, instruments or means likely to cause grievous bodily harm.

SECTION 5.

Justifiable Homicide.

ART. 1.

HOMICIDE is justifiable where the act from which death results is done in a lawful manner, in execution of a lawful sentence, by an officer or other person lawfully authorized to execute such sentence. (*a*)

(*a*) The Digest of Procedure will provide what shall constitute a lawful sentence, and a lawful manner of executing it, and who shall be persons lawfully authorized to execute it.

ART. 2.

Homicide is justifiable where an officer or other person, duly authorized by writ or warrant, to arrest, detain or imprison any party for any offence punishable with death, or upon any charge or suspicion of any such offence, or by reason of any indictment found against him for any such offence, or of any conviction of, or outlawry for, any such offence, or otherwise duly authorized by law to arrest, detain or imprison any party by reason of any such offence committed, or by reason of his conviction of, or outlawry for, any such offence, and using lawful means for the purpose, kills such party, in case of flight, or, (if such officer or other person have reasonable cause for believing that such party is consenting thereto,) in case of his being rescued, in order to prevent his escape from justice, and because such officer or other person has reasonable cause for believing that such party cannot otherwise be overtaken or his escape from justice prevented. (*b*)

(*b*) On the subject of justifiable homicide, the following are the principal points which the Commissioners submit for consideration :—

First. They have avoided laying down distinctions between justifiable and excusable homicide. These distinctions occupy a considerable space in the Reports and Treatises, in consequence of their importance with regard to the law of forfeiture, prior to the passing of the 9 Geo. IV., c. 31. The 10th section of that statute enacts, "that no punishment or forfeiture shall be incurred by any person who shall kill another by misfortune, or in his own defence, or in any other manner, without felony." In consequence of this statute, the Commissioners are enabled to state the law in a manner much more simple and compendious than that in which it is laid down in works of authority.

Secondly. Owing to the important changes which have taken place in the law, whereby felonies have been made to include a variety of offences of a much less aggravated description than those to which the term was originally applied, and the difference between felonies and misdemeanors having become, except as regards the law of procedure, merely nominal, the rules concerning justification in cases of homicide have in several instances, it is submitted, become unreasonable and inexpedient. Hence it has appeared expedient to modify the rules whereby, 1,—It is justifiable to kill a person who does not make resistance, but *flies*, after having committed a felony, or having given a dangerous wound (1 Hale, 489, 490; 1 Hawk. P. C. c. 28, s. 11; Fost. 271; 4 Black Comm. 179); or who is indicted for a felony, though he may be innocent, or though no felony may have been committed (1 Hawk. P. C. c. 28, s. 12), with a distinction in the latter case of doubtful authority, between the right of an officer and a private individual to kill. (2 Hale, 84; but see 1 Hale, 489, 490 and 1 East's P. C., c. 5, s. 68, pp. 300, 301.) 2, Whereby it is justifiable to kill a person in order to prevent him committing a *felony by force or surprise*, (Fost. 273; Kel. 128, 129; 1 Hale, 445, 481, 484; 1 Hawk. P. C., c. 28, s. 21). Some writers make a distinction between *known* and other felonies. Mr. Just. Foster says (Disc. II. c. 3, s. 1), "the injured party may repel force by force in defence of his person, habitation, or property, against one who manifestly intendeth, and endeavoureth by violence or surprise to commit a *known* felony upon either." But it has been holden that this rule does not apply to any crime unaccompanied with force, as picking of pockets (1 Hale, 488; 4 Black. Comm. 180.) Mr. Just. Blackstone's expression is, "such homicide as is committed for the prevention of any forcible and atrocious crime is justifiable."

With respect to the first-mentioned rule, we have made an important limitation of the law, by confining the justification to prevent escape, where there is no resistance, to cases where the party flying lies under a capital charge. The great alterations which have occurred since the rules on this subject were originally established in the definitions and punishments of offences, and the shadowy distinctions between many felonies and misdemeanors seem to require that the justification for taking away life in cases of flight should be confined in the manner provided for in the text. Besides which, all felonies in the cases in which the rule was allowed to operate, were originally punishable with death.

It may be thought that *notice* ought to be required to be given to the party pursued, where it is practicable. It is conceived, however, that various cases may occur in which notice would altogether frustrate the object of pursuit; but in ordinary cases notice would be expected without any further provision than that contained in the text—viz. that there must be reasonable cause for believing "that such person *cannot otherwise* be overtaken."

With respect to the last-mentioned rule, we have introduced an Article (11), which we trust will render the law on the subject more coherent.

Thirdly. Much uncertainty and contradiction is to be found in the books with regard to the circumstances under which homicide is justifiable, where a man is killed by an officer whom he resists, or where he is killed by a party who is preventing him from doing such party a personal injury, or an injury to the enjoyment of his real or personal property. The language in some authorities would seem to imply, that the killing in such cases must be purely accidental; as where Mr. Just. Foster (Disc. II. c. 8, s. 24),

speaking of gaolers and other officers who are resisted in the execution of their duty, says, "If the party resisting *happeneth* to be killed, this, on the part of the gaoler, &c., will be justifiable homicide." From others it might be inferred that unless, in point of fact, the killing was necessary for the execution of duty, or the preservation of life, it would not be justifiable; though it is obvious, that the party killing might at the time have the most reasonable grounds for belief in a necessity which a jury at the trial might see did not, in point of fact, exist; as "if a person, having actually committed a felony, will not suffer himself to be arrested, but stand on his own defence or fly, *so that he cannot possibly* be apprehended alive by those who pursue him, &c., he way be lawfully slain by them." (Hawk. P. C., b. 1, c. 28, s. 11.) So again, "If any innocent person be indicted of a felony, &c., and will not suffer himself to be arrested by the officer, &c., he may be lawfully killed by him, *if he cannot otherwise be taken.*" *Ibid.* We have in all these cases made the justification to depend upon the party killing, *having reasonable cause for believing* the homicide to be necessary for the execution of his duty. One authority, which has been *disapproved* of, requires an officer to give way before he is allowed to kill. See Rolle's Report, which contains an opinion to that effect; but which Mr. Just. Foster (Disc. II. c. 2, s. 2) thinks too severe, "for few men would quietly submit to an arrest, if in every case of resistance the party empowered to arrest was obliged to desist and leave the business undone." Most authorities draw a distinction as to the necessity for retreating before killing, to justify homicide between those cases where the killing is in the defence of person and those where it is in the defence of property, making it requisite in the former cases but not in the latter. But the only true distinction, according to Mr. Just. Foster (Disc. II. c. 3, s. 1), appears to be between that sort of homicide *se et sua defendendo*, which is perfectly innocent and justifiable, as where a felonious attack is made upon a person or his property, and that which is in some measure blameable and barely excusable, as where parties fight upon a sudden quarrel. In the former case, the party killing is not bound to retreat—in the latter he must. The Articles introduced by us on this subject, both as regards officers as well as private persons, will, we trust, remove all doubts as to the cases where retreat or other circumstances are necessary in order to justify homicide.

Art. 3.

Homicide is justifiable where an officer, or other person lawfully executing (*c*) any writ, warrant or process, civil or criminal, or lawfully acting in obedience to the command of a magistrate, or otherwise lawfully acting under authority for the advancement of the law, or lawfully interposing for the prevention or suppression of any offence, is unlawfully and forcibly resisted, and using no more force than he has reasonable cause for believing to be necessary to overcome such resistance, kills the person so resisting; or, being by reason of the violence opposed to him, under reasonable fear of death if he proceed to execute his authority, and, because he has reasonable cause for believing that he cannot otherwise execute his authority and preserve his life, kills him who so resists.

(*c*) The most approved treatises contain a multitude of decisions regarding the arrest of the person, the entering of houses, the lawfulness of warrants or other process, and the lawful and unlawful modes of executing them. The circumstance that a criminal proceeding has turned on the point of the validity or due execution of process has been thought a ground for treating the execution of process as a parcel of the substantive criminal law. When it is laid down that the process must be lawful, and must be lawfully executed, most of the cases here referred to will be found to be nothing else than decisions upon points of civil or criminal procedure. It is necessary, however, to insert in this Act the rules regarding *notice;* for they do not appear to be essential to the lawful execution of civil or criminal process but to have been established in qualification of the rules justifying persons executing the law in the commission of *homicide*. Articles 6, 7, 8, 9, and 10 have been introduced accordingly.

Art. 4.

An officer or other person shall be deemed to be acting under authority for the advancement of the law, not only whilst he is actually executing or endeavouring to execute that authority, but also whilst he is proceeding to execute it, or is retreating, having executed, or being unable by reason of resistance or other cause to execute it.

Art. 5.

Every writ, warrant or process, provided it has been issued in the ordinary course of justice, from a Court or by a Judicial officer having competent jurisdiction to issue the same, and expresses, either by name or description, the person by and against whom, and, in substance, the cause for which the same is to be executed, is a sufficient writ, warrant or process, within the meaning of Article 6 of Section 3 of this Chapter, and Article 3 of this Section. (*d*)

(*d*) Fost. 311; 1 Russ. (by Greaves), pp. 617, 618, and the cases there cited.

Art. 6.

It is essential to every justification of killing, by an officer or other person acting by virtue of any writ, warrant or process, or in obedience to the command of a magistrate, within the meaning of Article 3 of this Section, that at the time such writ, warrant, process or command was executed or attempted to be executed, the person resisting had notice that the officer or other person executing or attempting to execute the same purposed to act under such authority.

ART. 7.

It is sufficient for such justification that the officer or other person gave notice of the authority under which he purposed to act, without exhibiting it.

ART. 8.

It is essential to every justification of killing, by an officer acting for the advancement of the law or interposing for the prevention of any offence, by virtue of his mere official authority and without writ, warrant or process, that the person resisting had notice that such officer had such authority, and that he acted or interposed for such purpose.

ART. 9.

It is not necessary that the notice mentioned in Articles 6 and 8, should have been given in express terms; such notice may be presumed or collected as a matter of fact, from the terms used by the officer or other person, or from other circumstances.

ART. 10.

It is essential to every justification of killing, by a private person acting for the advancement of the law or interposing for the prevention of any offence, of his own authority, that express notice should have been given to the party resisting, that such private person acted or interposed for such purpose.

ART. 11.

Homicide is justifiable where the party killing has reasonable cause for believing it to be necessary, for preventing the perpetration of any offence in respect of which the punishment of transportation for life or any higher punishment may be awarded, attempted to be committed by violence or surprise against the person, habitation or property of the party killing, or of any other.

ART. 12.

Homicide is justifiable where one in lawful defence of his person repels force by force, and, using no more violence than he has reasonable cause for believing to be necessary for the purpose of self-defence, kills the assailant; or being, from the violence with which such assailant pursues his purpose, under reasonable apprehension of immediate death, and because he has reasonable cause for believing that he cannot otherwise preserve his life, kills such assailant.

ART. 13.

Homicide in self-defence is justifiable, although the party killing was guilty of an assault, or engaged in an unlawful conflict which led to the homicide. (*e*) The rule is subject to the following limitations:—

That the party killing did not either commence or provoke the attack with intent to kill or do grievous bodily harm, nor, during the conflict and before the necessity for killing arose, endeavour to kill or do grievous bodily harm;

That he declined further conflict, and quitted and retreated from it, so far as was practicable with safety to his life;

That he killed the assailant because he had reasonable cause for believing it to be necessary so to do, in order to avoid immediate death.

(*e*) This rule appears to rest on the opinion of Mr. Just. Foster (Disc. II., c. 3, p. 277), who says that he *thinks* that as in manslaughter upon sudden provocations, so in this case, "the first assault in a sudden affray, all malice apart, will make no difference, if either party quitted the combat and retreated before a mortal wound be given;" but Mr. Serjt. Hawkins (P. C. b. 1, c. 29, s. 17) says that such a person seems to be too much favoured by this opinion. We think, however, that subject to the limitations stated in the above Article, the rule is a just one.

ART. 14.

Homicide is not justifiable in self-defence in any case where it is mentioned in Articles 6, 7, and 10 of Section 3 of this Chapter not to be extenuated.

ART. 15.

Homicide is justifiable where one, in defence of moveable property in his lawful possession, repels force by force, and using no more violence than he has reasonable cause for believing to be necessary, for the defence of such property against

wrong, kills the wrongdoer; or, being from the violence with which such wrongdoer pursues his purpose, under reasonable apprehension of immediate death, if he persist in the defence of such property, and because he has reasonable cause for believing that he cannot otherwise defend such property and preserve his life, kills such wrongdoer.

ART. 16.

Homicide is justifiable where one, in defence of house or land in his lawful possession, resisting a person endeavouring by force to enter into or upon such house or land, repels force by force, and, using no more violence than he has reasonable cause for believing to be necessary for the defence of his possession, kills the wrongdoer; or, being from the violence with which such wrongdoer pursues his purpose, under reasonable apprehension of immediate death if he persist in the defence of his possession, and because he has reasonable cause for believing that he cannot otherwise defend his possession and preserve his life, kills such wrongdoer.

ART. 17.

Homicide is justifiable where one in lawful possession of house or land, after requesting another who has no right to be there to depart, upon such wrongdoer's refusal to do so, is resisted in his endeavour to remove him, and using no more violence than he has reasonable cause for believing to be necessary for the removal of such wrongdoer, kills him; or being, from the violence with which such wrongdoer resists being removed, under reasonable apprehension of immediate death if he persist in his endeavour to remove him, and because he has reasonable cause for believing that he cannot otherwise remove such wrongdoer and preserve his own life, kills such wrongdoer.

ART. 18.

Homicide is justifiable where a party who would have been justified, in self-defence or otherwise, in killing one person, by mistake or accident and without negligence, kills another person.

ART. 19.

Homicide is justifiable where death results from an act done in good faith with the intention of affording succour or aid to any other person, by rescuing him from danger or curing him of any bodily injury, or of any disorder or disease, or where death results from any other act done with a view to the bodily safety or health of any other person, without any intention in any such case to kill or injure such person, provided that no unnecessary risk or peril be wilfully incurred; and provided also that the act be not attributable to want of reasonable caution. (*f*)

(*f*) The treatises generally contain a provision justificatory of the homicide of an unoffending party committed in order to save the life of the accused, or rather because the accused reasonably thought that the homicide was indispensable for preserving his own life. We propose to omit any justificatory rule for these occasions. Independently of the question which has been much discussed by ancient and modern jurists of the right *in foro conscientiæ* of a person depriving another of life under such circumstances, we conceive that there would be less inconvenience in leaving persons to the mercy of the Crown who have thus acted under circumstances of sudden and extreme peril, than in holding out protection to the general disposition of all persons to overrate the danger to which they are exposed, and to place too low an estimate on the life of another when placed in the balance against prospect of additional safety to themselves. The Indian Law Commissioners (Note B to their Penal Code) express themselves on this subject in the following terms:—"There are, as we have said, cases in which it would be useless cruelty to punish acts done under the fear of death, or even of evils less than death. But it appears to us impossible to precisely define these cases; we have, therefore, left them to the Government, which, in the exercise of its clemency, will doubtless be guided in a great measure by the advice of the Court."

SECTION 6.

Self-Murder.

ART. 1.

WHOSOEVER, with the direct intention of causing his own death or that of some other person, shall do or omit any act from the doing or omission of which his own death shall result, shall be deemed to have committed self-murder: Provided that where such act is done or omitted, with the intention of causing the death of some other person, it be so done or omitted under such circumstances that had such other person been killed such killing would have been murder. (*a*)

(*a*) On the subject of the punishment of confiscation in cases of self-murder, it is observed, in Eden's

Principles of Criminal Jurisprudence,—"The confiscation of property inflicted by many governments on the crime of suicide, is ineffectual and absurd. It is cruel, also, and unjust thus to heap suffering on the head of innocence, by punishing the child for the loss of its parent, or aggravating the distress of the widow, because she has been deserted by her husband. Temporary considerations have no weight with those to whom the prospect of eternity is become a subject of indifference." Mr. Livingstone's remarks on the same subject are as follows: "Suicide can never be punished but by making the penalty (whether it be forfeiture or disgrace) fall exclusively on the innocent. The English mangle the remains of the dead. The inanimate body feels neither the ignominy nor pain. The mind of the innocent survivor alone is lacerated by this useless and savage butchery, and the disgrace of the execution is felt exclusively by him, although it ought to fall on the laws which inflict it. The father, by a rash act of self-destruction, deprives his family of the support he ought to afford them; and the law completes the work of ruin, by harrowing up their feelings, covering them with disgrace, and depriving them by forfeiture of their means of subsistence."

Art. 2.

Whosoever shall procure or promote, or be present aiding in or abetting the commission of self-murder, shall incur the penalties of the 2nd class (*b*)

(*b*) This offence is murder by the present law. We propose to make it punishable with transportation for life, or not less than seven years, only.

In Dyson's Case, Russ. & Ry. 523, upon the indictment of a man for murdering a woman by drowning, the Jury, under the direction of the Judge, stated that they were of opinion that both the prisoner and the deceased went to the water for the purpose of drowning themselves, and the prisoner was convicted. But the Judge who tried the case, thought it right to submit his direction to the consideration of the Judges, who, after considering the case, were clear that if the deceased threw herself into the water by the encouragement of the prisoner, and because she thought he had set her the example in pursuance of their previous agreement, he was a principal in the second degree, and guilty of murder. The case of R. *v.* Alison, 8 Car. & P. 104, was decided upon the same principle.

We beg to refer to our observations on Article 14 of Section 3 of this Chapter, touching homicide by consent, in support of the modification of the actual law suggested in the present Article.

It is to be remarked that, according to the present law, a person cannot be tried as an accessory before the fact to self-murder; for the stat. 7 of King Geo. IV., c. 64, s. 9, which provides that an accessory before the fact may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, only extends to such persons as were previously liable to be tried either with or after the principal; and an accessory before the fact to self-murder was not triable at common law. R. *v.* Russell, Moo. C. C. R. 356.

SECTION 7.

Other Offences against the Person. (*a*)

(*a*) The provisions of the present law (7 Will. IV., and 1 Vic., c. 85), applicable to acts done, and to attempts with intent to commit murder, or to do grievous bodily harm, are as follows:—

"Sect. 2. Whosoever shall administer to or cause to be taken by any person any poison or other destructive thing, or shall stab, cut or wound any person, or shall by any means whatsoever cause to any person any bodily injury dangerous to life, with intent in any of the cases aforesaid to commit murder, shall be guilty of felony, and being convicted thereof, shall suffer death.

3. Whosoever shall attempt to administer to any person any poison or other destructive thing, or shall shoot at any person, or shall, by drawing a trigger or in any other manner attempt to discharge any kind of loaded arms at any person; or shall attempt to drown, suffocate or strangle any person, with intent in any of the cases aforesaid to commit the crime of murder, shall, although no bodily injury shall be effected, be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of his or her natural life, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years.

4. Whosoever unlawfully and maliciously shall shoot at any person, or shall, by drawing a trigger or in any other manner, attempt to discharge any kind of loaded arms at any person, or shall stab, cut or wound any person, with intent in any of the cases aforesaid to maim, disfigure or disable such person, or to do some other grievous bodily harm to such person, or with intent to resist or prevent the lawful apprehension or detainer of any person, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of his or her natural life, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years.

5. Whosoever shall unlawfully and maliciously send or deliver to, or cause to be taken or received by any person any explosive substance, or any other dangerous or noxious thing, or shall cast or throw upon or otherwise apply to any person any corrosive fluid or other destructive matter, with intent in any of the cases aforesaid to burn, maim, disfigure or disable any person, or to do some other grievous bodily harm to any person, and whereby in any of the cases aforesaid any person shall be burnt, maimed, disfigured or disabled, or receive some other grievous bodily harm, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of his or her natural life, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years."

It appears to the Commissioners, that in cases within Article 1, where the injury is so proximate to that of murder, the offence ought to be punished with peculiar severity; and that in the cases included within Article 2, on the principle of leaving a "*locus penitentiæ*," and where juries would be reluctant to convict for a capital offence, a less punishment ought to be inflicted. On the subject of capital punishment, however, in the above cases, your Commissioners wish for an opportunity of reconsidering their opinion, when they shall present a general Chapter on the subject of Punishments.

The Commissioners think, also, that a punishment should be inflicted for actually doing grievous bodily harm, for which there is no specific punishment according to the present law; and a less punishment for attempts to do grievous bodily harm.

It is submitted that this arrangement will render the provisions of the law more complete and uniform than as it stands at present under the above-cited enactments.

Your Commissioners do not think it expedient to retain in Article 1 the provisions of the present law regarding stabs, cuts or wounds. They think that any bodily hurt, by means manifesting an intent to commit murder, ought to be punished with peculiar severity. They beg to refer to the following cases, in which serious injuries were done, with intent to commit murder, or to do grievous bodily harm, but where the perpetrators escaped, in consequence of the confined import of the words "*stab, cut or wound.*" Moreover, the law is incumbered with many decisions regarding the definitions of "stabbing, cutting and wounding;" nor does it appear that there can be a stab or cut without a wound, as that term is defined by the decisions. The word "wound" appears to have been originally introduced in the 9 Geo. IV., c. 31, and subsequently continued in the 7 Will. IV., and 1 Vic. c. 85, to obviate the difficulties which had arisen upon the construction of the words "cut or stab." The former being properly a wound with an instrument having a sharp edge, and the latter a wound with a pointed instrument, it had been held that a blow with the *blunt* end of a hammer was not sufficient, though if it had been with the *sharp* claw or point of a hammer, it would have been a *cut*, (Atkinson's Case, Russ. & Ry. 104.) So a blow with a square iron bar, which inflicted a contused or lacerated wound, had been held not to be a *cut*, (Adams's Case, cited in Russ. on Crimes (Greaves), p. 728). The word "wound," which has been defined to be any injury to the person by which the skin is broken (per Lord Lyndhurst, C.B., in Moriarty *v.* Brooks, 6 Car. & P. 684), although including many injuries to the person not within the meaning of a stab or cut, nevertheless, has been decided not to embrace many hurts which manifest to the full as wicked an intention as those to which it has been held to apply. For instance, it has been held not to include a scratch inflicted with a butcher's knife in the attempt to cut the throat of the person scratched, (R. *v.* Beckett, 1 Moo. & Ry. 526). Neither is a separation of the cuticle or upper skin only sufficient, the whole skin must be separated, (R. *v.* Harris, 7 Car. & P. 446). So it is not sufficient that bones are broken unless the skin be also broken, (R. *v.* Wood, 1 Ry. & Moo. C. C. R. 278; 4 Car. & P. 381). But if the skin be broken internally only, and not externally, that will do, (Reg. *v.* Smith, 8 Car. & P. 173). The injury must also be inflicted by some instrument, and not by the hands or teeth, to be constituted a wound (R. *v.* Harris, 7 Car. & P. 446); but any kind of instrument is sufficient, as a bludgeon (R. *v.* Payne, 4 Car. & P. 558), a stone bottle, (R. *v.* M'Loughlin, 8 Car. & P. 635), a shoe, whether off or on the foot (R. *v.* Shadbolt, 5 Car. & P. 504), or even a piece of hat, where upon a blow given with the butt end of a gun upon the head of a person who had his hat on, a piece of the hat was the immediate cutting substance, (R. *v.* Sheard, Moo. C. C. R. 33). It seems doubtful whether the teeth of a dog, which has been set to bite a person, would be sufficient. Mr. Bar. Alderson, however, in Elmsly's Case, (2 Lew. 126,) seems to have thought that they would, though it did not become necessary to decide the point.

According to the present law, any stab, cut or wound, however slight, with intent to commit murder, is a capital offence; but any other bodily harm, however grievous, must be *dangerous to life* in order to make the doing of it capital. This seems inconsistent; and, moreover, the leaving to juries the question of an injury being dangerous to life or not seems inexpedient.

With regard to attempts with intent to commit murder or to do grievous bodily harm, your Commissioners think it expedient to single them out from the general provisions regarding attempts, which will be considered in a separate part of the digest, and to visit them with a peculiar punishment; but they do not see adequate grounds for making distinctions between different kinds of such attempts; and the retaining such a distinction would render the digest more complicated, besides affording ground for many discussions in regard to the particular means used—not whether they indisputably manifested a design to kill, but whether the particular means indicated by the Legislature had been resorted to—in which discussions there is often a leaning *in favorem vitæ*, that occasions unreasonable strictness in interpreting the terms used by the Legislature. For instance, it was held that evidence of a stab would not support a charge of cutting, for as the statute under which the party was indicted used the words in the alternative, the distinction ought to have been attended to in the indictment, (R. *v.* M'Dermot, Russ. & Ry. 356). But the question whether the attempt was manifestly with intent to commit murder or to do grievous bodily harm, is one of fact for the jury which is not likely to lead to subtle questions of interpretation.

Art. 1.

Whosoever shall administer to, or cause to be taken by, any other person any poison or other destructive thing, or shall by any means manifesting a design to kill, cause bodily harm to any other person, with intent in any of the cases aforesaid to commit murder, shall suffer death. (*b*)

(*b*) See 7 Will. IV., and 1 Vic. c. 85, ss. 1 and 2.

Art. 2.

Whosoever shall by any means manifesting a design to kill other than the actually administering or causing to be taken poison or any other destructive thing, attempt to commit murder, shall, although no bodily harm shall be caused, incur the penalties of the 4th class. (*c*)

(*c*) See 7 Will. IV., and 1 Vic. c. 85, ss. 3 and 8.

Art. 3.

Whosoever shall set fire to, cast away or in anywise destroy any ship, vessel, boat or raft, with intent to murder any other person, or shall maliciously do any such act whereby the life of any other person shall be put in danger, shall suffer death. (*d*)

(*d*) See 7 Will. IV., and 1 Vic. c. 89, s. 4.

ART. 4.

Whosoever shall, by any means not hereinbefore in this Section specified, maliciously put the life of any other person in danger, shall incur the penalties of the 7th class.

ART. 5.

Whosoever shall negligently, as hereinbefore in Article 5 of Section 2 of Chapter I. defined, cause any danger to the life of any other person shall incur the penalties of the 9th class.

ART. 6.

Whosoever shall maliciously cause to any other person any grievous bodily harm shall incur the penalties of the 3rd class. (*e*)

(*e*) The only injuries to the person short of murder and attempts to murder which are punished more severely than by fine and imprisonment according to the present law, are attempts to "maim, disfigure, disable or do grievous bodily harm."

The offence of mayhem, which consists in rendering a man less capable of fighting, and the nice distinctions to which it leads, seem to make it unfit to be retained in any modern code.

A maim has been defined to be a bodily hurt, whereby a man is rendered less able in fighting to defend himself, or to annoy his adversary. (Staund. P. C. 3; 3 Inst. 62, 118; 1 Hawk. P. C. c. 55, s. 1; 4 Black. Comm. 205.) Therefore the cutting off or disabling, or weakening a man's hand or finger, or striking out his eye or *fore*-tooth, or depriving him of those parts, the loss of which in all animals abates their courage, are held to be maims; but the cutting off his ear, or nose, or the like, are not held to be maims at common law, because they do not weaken a man, but only disfigure him. (4 Black. Comm. 205, 206.)

The other injuries of disfiguring, disabling and doing grievous bodily harm, are left in an uncertain, undefined state by the present law, and the distinctions to which they lead of injuries inflicted by sharp or blunt instruments, do not appear to afford any reasonable ground for diversity of punishment.

It seems expedient is to use some term or terms which may include all the serious personal injuries short of death, the commission of which, and the attempting to commit which should be visited with a severer punishment than other personal injuries. There appears to be no occasion for employing more than one term for this purpose. The Commissioners think that the term "grievous bodily harm" may be conveniently used to express what is required. And in defining that term (see Article 1 of Chapter III.), they have endeavoured to include within its meaning the more serious kinds of personal injury, without reference to pugnacity or other principle than the damage and suffering occasioned. The limitation of 20 days is taken from the French code, and was adopted from that code by the Indian Law Commissioners. The following are their remarks on this subject:—

"We propose to designate all pain, disease and infirmity, by the name of hurt.

"We have found it very difficult to draw a line between those bodily hurts which are serious and those which are slight. To draw such a line with perfect accuracy is, indeed, absolutely impossible; but it is far better that such a line should be drawn, though rudely, than that offences, some of which approach in enormity to murder, while others are little more than frolics which a good-natured man would hardly resent, should be classed together.

"We have, therefore, designated certain kinds of hurt as grievous.

"We have given this name to emasculation—to the loss of the sight of either eye—to the loss of the hearing of either ear—to the loss of any member or joint—to the permanent loss of the perfect use of any member or joint—to the permanent disfiguration of the head or face—to the fracture, and to the dislocation of bones. Thus far we proceed on sure ground; but a more difficult task remains, some hurts which are not like those kinds of hurt which we have just mentioned, distinguished by a broad and obvious line from slight hurts, may nevertheless be most serious. A wound, for example, which neither emasculates the sufferer nor blinds him, nor destroys his hearing, nor deprives him of a member or joint, nor permanently deprives him of the use of a member or joint, nor disfigures his countenance, nor breaks his bones, nor dislocates them, may yet cause intense pain, prolonged disease, lasting injury to the constitution. It is evidently desirable that the law should make a distinction between such a wound and a scratch which is healed with a little sticking-plaster. A beating, again, which does not maim the sufferer, or break his bones, may be so cruel as to bring him to the point of death. Such a beating, it is clear, ought not to be confounded with a bruise, which requires only to be bathed with vinegar, and of which the traces disappear in a day.

"After long consideration, we have determined to give the name of grievous bodily hurt to all hurt which causes the sufferer to be in pain, diseased, or unable to pursue his ordinary avocations during the space of twenty days.

"This provision was suggested to us by Article 309, of the French Penal Code. That Article runs thus: "Sera puni de la peine de la réclusion, tout individu qui aura fait des blessures ou porté des coups, s'il est resulté de ces actes de violence, une maladie ou incapacité de travail personnel pendant plus de vingt jours." Réclusion, it is to be observed, signifies imprisonment and hard labour, for a term of not less than five not more than ten years.

"This law appears from the *procès verbal* of Napoleon's Council of State, to have been adopted without calling forth a single * observation. But it has since been severely criticised by French jurists, and has been mitigated by the French Legislature. Indeed it ought to have been completely recast, for it is undoubtedly one of the most exceptionable laws in the code.

"A man who means only to inflict a slight hurt may, without intending or expecting to do so, cause a hurt which is exceedingly serious. A push, which to a man in health is a trifle, may, if it happens to be directed against a diseased part of an infirm person, occasion consequences which the offender never contemplated as possible. A blow, designed to inflict only the pain of a moment, may cause the person struck to lose his footing, to fall from a considerable height, and to break a limb. In such cases, to punish the assailant with five years of strict imprisonment would be in the highest degree unjust and

* Locré Legislation de France, vol. 30, page 362.

cruel. It is said, and we can easily believe it,* that in such cases, the French juries have frequently refused, in spite of the clearest evidence, to pronounce a decision which would have subjected the accused to a punishment so obviously disproportionedto his offence.

"We have attempted to preserve and to extend what is good in this Article of the French code, and to avoid the evils which we have noticed. It appears to us, that the length of time during which a sufferer is in pain, diseased, or incapacitated from pursuing his ordinary avocations, through a defective criterion of the severity of a hurt, is still the best criterion that has ever been devised. It is a criterion which may, we think, with propriety be employed, not merely in cases where violence has been used, but in cases where hurt has been caused without any assault, as by the administration of drugs, the setting of traps, the digging of pit-falls, the placing of ropes across a road. But though we have borrowed from the French code this test of the severity of bodily injuries, we have framed our penal provisions on a principle quite different from that by which the authors of the French code appear to have been guided. In apportioning the punishment, we take into consideration both the extent of the hurt and the intention of the offender.

"What we propose is, that the voluntary infliction of simple bodily hurt shall be punished with imprisonment of either description, which may extend to one year or five, or both; the voluntary infliction of grievous bodily hurt, with imprisonment of either description for a term which may extend to ten years, and must not be less than six months, to which fine may be added."

The following are the clauses of their Penal Code in conformity with the foregoing suggestions:—

"314. All bodily pain, disease and infirmity, is designated as 'hurt.'

"315. The following kinds of hurt are designated as 'grievous:'—

"*First.*—Emasculation;

"*Secondly.*—Permanent privation of the sight of either eye;

"*Thirdly.*—Permanent privation of the hearing of either ear;

"*Fourthly.*—Privation of any member or joint;

"*Fifthly.*—Destruction or permanent impairing of the powers of any member or joint;

"*Sixthly.*—Permanent disfiguration of the head or face;

"*Seventhly.*—Fracture or dislocation of any bone other than a tooth;

"*Eighthly.*—Such hurt that the sufferer is, during the space of twenty days, in bodily pain, diseased or unable to follow his ordinary pursuits.

"316. Whoever does any act, or omits what he is legally bound to do, with the intention of thereby causing hurt to any person, or with the knowledge that he is likely thereby to cause hurt to any person, and does thereby cause hurt to any person, is said 'voluntarily to cause hurt.'

"317. Whoever voluntarily causes hurt, if the hurt which he intends to cause, or knows himself to be likely to cause, is grievous hurt; and if the hurt which he causes is grievous hurt, is said 'voluntarily to cause grievous hurt.'"

With regard to Mr. Starkie's objection to the definition, proposed by the other Commissioners, of the term "grievous bodily harm" (see his note, p. 56, below), it will probably be conceded that it is desirable to draw a line between greater and lesser personal injuries short of homicide. The term "grievous bodily harm" has hitherto been that principally used to mark this distinction: great inconvenience has been found from leaving the import of this term to be collected from a multitude of scattered decisions, especially as those decisions have reference to the peculiar facts of the cases in which they were delivered. Your other Commissioners would have been glad if any other boundary line of a more definite character had been suggested to them; but they do not think that the line adopted in the French Code will occasion any inconvenience in practice, for in the Articles which relate to attempts to do bodily harm, and to persons acting under fear of bodily harm, the questions which juries will have to decide relate to the presumable opinions of others as to the probable extent of contemplated injuries. In these cases the Article may serve as a useful guide, but cannot fetter the judgment by any narrow rule, whilst the inclination of juries will generally lead them to a view of the circumstances unfavourable to a wrong-doer. Where an actual injury is committed, the Article will at once indicate the legal character of that injury, nor is it, it is conceived, a sufficient objection to definite rules of law, which are framed to meet the generality of cases, that particular cases that are near the boundary line on either side are scarcely distinguishable from each other in point of criminality.

Art. 7.

Whosoever shall forcibly resist any officer or other person whilst such officer or other person believes himself to be lawfully executing any writ, warrant or process, civil or criminal, or whilst such officer believes himself to be acting in obedience to the command of a magistrate, or to be otherwise lawfully acting under authority for the advancement of the law, although, in fact, such writ, warrant or process be not sufficient in law, or such command be unlawful, or such officer have no such authority as aforesaid, or the manner of executing such writ, warrant, process, command or other authority be unlawful, and shall, in so resisting (although he use no more violence than the law permits for the purpose of self-defence) cause any grievous bodily harm to such officer or other person, shall, provided the person causing such harm had notice that such officer or other person purposed to act under the authority of such writ, warrant or process, or in obedience to such command, or otherwise for the advancement of the law, incur the penalties of the 3rd class (*f*).

(*f*) This Article is new. We are aware that it may be urged that to be consistent a further Article should be introduced to make it penal to offer any resistance whatever to an officer who is acting illegally, provided he believe himself to be acting legally; but as the above Article is a great extension of the present law, we have not felt ourselves justified in carrying it further. It may be proper hereafter to transfer this Article to the Chapter of offences against the administration of justice.

* Paillet Manuel de droit Français. Note on clause 309, of the Penal Code.

ART. 8.

The notice intended by the last preceding Article is such notice as by Section 5 of this Chapter is made essential to the justification of killing by officers and other persons acting for the advancement of the law.

ART. 9.

Whosoever shall maliciously, by any means manifesting a design to cause grievous bodily harm, attempt to cause grievous bodily harm to any other person, shall, whether any bodily harm be caused to such person or not, incur the penalties of the 4th class. (*g*)

(*g*) See the 7 Will. IV., and 1 Vict., c. 85. ss. 4 and 5.
The offences contained in the 4th section of the 7 Will. IV., and 1 Vic. c. 85, are "with intent to resist or prevent the lawful apprehension or detainer of any person as well as with intent to do some grievous bodily harm;" but the Commissioners propose to provide for those offences when done with the former intent, under the Chapter of Offences against the Administration of Justice.

ART. 10.

Whosoever shall negligently, as hereinbefore in Article 5 of Section 2 of Chapter I. defined, cause to any other person any grievous bodily harm, shall incur the penalties of the 11th class.

ART. 11.

Whosoever shall maliciously impede any other person endeavouring to save his life from any ship or vessel which shall be in distress, or wrecked, stranded or cast on shore (whether such person shall be on board or shall have quitted the same), shall incur the penalties of the 4th class. (*h*)

(*h*) See the 7 Will. IV., and 1 Vic. c. 89, ss. 7 and 12.

ART. 12.

Whosoever shall set or place, or cause to be set or placed, any spring-gun, man-trap or other engine calculated to destroy human life or cause grievous bodily harm, with intent that the same or whereby the same may kill or cause grievous bodily harm to any trespasser or other person coming in contact therewith; or shall knowingly and wilfully permit any such engine which may have been set, fixed or left in any place being in his possession or occupation, to continue so set or fixed in such place, shall incur the penalties of the 9th class. (*i*)

(*i*) 7 and 8 Geo. IV. c. 18, ss. 1 and 3.

ART. 13.

The rule contained in the last preceding Article shall not extend to make it illegal to set any gun or trap, such as may have been or may be usually set with intent to destroy vermin; or to set or cause to be set during the night-time any spring-gun, man-trap or engine which shall be set or continued to be set in a dwelling-house for the protection thereof. (*k*)

(*k*) See 7 and 8 Geo. IV. c. 18, ss. 2 and 4. The only alteration in the present law relating to the setting of spring-guns proposed is the adoption of the definition of the term *dwelling-house* used in the 7 and 8 Geo. IV. c. 29, for the purposes of burglary, and the substitution of the term *night-time*, as defined in the 7 W. IV., and 1 Vic. c. 86, s. 4, for the like purposes, for the words of the 7 and 8 Geo. IV. c. 18, "from sun-set to sun-rise."

ART. 14.

The definition of the terms "night-time" and "dwelling-house," for the purposes of burglary, shall be applicable to those terms as used in the last preceding Article.

ART. 15.

Every woman being with child, who, with intent to procure her own miscarriage, shall maliciously administer to herself any poison or other noxious thing, or use any instrument or other means whatsoever; and every person who, with intent to procure the miscarriage of any woman whether she be or be not with child, shall maliciously administer to or cause to be taken by her any poison or other noxious thing, or use any instrument or other means whatsoever, shall incur the penalties of the 4th class. (*l*)

(*l*) See the 7 Will. IV., and 1 Vic. c. 85, ss. 6 and 8.
The old law required that the woman should be "quick with child." The latest Act upon the subject omits these words. Some doubt prevails on the point, whether under the present law it is not necessary that the woman should be pregnant. It is desirable to remove this doubt; and we think that

to constitute the offence there should be some possibility of injury to a child in the woman, though it is not material that the woman should be "quick with child," if, indeed, these terms were not objectionable on other grounds.

Art. 16.

Provided that no act specified in the last preceding Article shall be punishable where such act is done in good faith with the intention of saving the life of the woman whose miscarriage is intended to be procured. (*m*)

(*m*) This proviso seems expedient: it is contained in other codes, but does not appear to have been adverted to in our treatises.

Art. 17.

Where any woman shall have been delivered of a child, every person who shall by any secret disposition of the dead body of such child, whether such child died before, at, or after its birth, endeavour to conceal the birth of such child, shall incur the penalties of the 10th class. (*n*)

(*n*) See the 9th Geo. IV. c. 31, s. 14. First, the language of the present provision on the subject has been altered by the omission of the words "secret burying," those words having given rise to doubts as to whether the words "or otherwise disposing" which immediately follow, must not be construed to mean some *final* disposition, in contradistinction to a merely temporary one. See R. *v.* Watkins, Mon. Sp. Assizes, 1841, MSS. cited in the note, to Greaves's ed. of Russ. on Crimes, vol. i. p. 574. R. *v.* Snell, 2 Moo. and Rob. 44; R. *v.* Ash, 2 Moo. and Rob. 294; Rex *v.* Ball, *ibid.* in notes. R. *v.* Goldthorpe, 2 Moo. C. C. R. 244, however, where it was held that the finding of the dead body of a child between the bed and a mattress was a sufficient disposing of the body, is an authority in support of the law as laid down in the above Article. It appears to us that, in many cases where it is intended finally to dispose of the dead body of a child, it is in the first instance disposed of temporarily, until an opportunity may offer of disposing of it finally without detection; and that where it is disposed of finally, the offender will commonly escape. Thus, in order to repress the crime of child murder effectually, it seems expedient to punish the disposing temporarily of the child with secrecy. The provision of the Scotch Law upon this subject, as cited by Mr. Alison, in his Principles of the Criminal Law of Scotland, p. 153, is asfollows:—"If a woman shall conceal her being with child during the whole period of her pregnancy, and shall not call for or make use of help or assistance in the birth, and if the child shall be found dead, or be amissing, she shall be imprisoned for a period not exceeding two years."

Secondly, by the present law, upon an indictment for murder, the woman only can be convicted of *endeavouring to conceal the birth*, although third persons may be indicted under the 9 Geo IV. c. 31, s. 31, for counselling, aiding, or abetting the mother in so doing, R. *v.* Douglas, Ry. and Moo. C. C. R. 480; we have, therefore, altered the language of the present provision, so as to make third persons indictable for the endeavour to conceal.

Lastly, it has been thought expedient to abolish that anomaly of the law whereby a person indicted for murder may be found guilty of concealing the birth. On the one hand the question of murder is never fairly considered by the Jury; and, on the other, the prisoner is embarrassed by having to apply the evidence and defence to two alternative charges at once. After reciting the English statute, 43 Geo. III., c. 58, which is on the same principle as the present Act, (9 Geo. IV., c. 31, s. 14), Mr. Alison, p. 158, says: "But this statute is so far defective and inferior to the Scotch Act, that it makes no provision for a trial of the prisoner for concealment, independent of a charge of murder, which is accordingly incompetent by their law."

Art. 18.

Whosoever shall unlawfully and carnally know any woman against her will and by force, or whilst she is insensible, shall be guilty of rape, and incur the penalty of the 2nd class. (*o*)

(*o*) See the 9th Geo. IV. c. 31, s. 16, and 4 and 5. Vic. c. 56, s. 3.

In Reg. *v.* Champlin (Den. C. C. R. p. 89), where the prisoner made the prosecutrix quite drunk, and, whilst she was in a state of insensibility, took advantage of it and violated her, the jury having found that the prisoner gave her the liquor for the purpose of exciting her, and not with the intention of rendering her insensible and then having sexual intercourse with her, upon a case reserved for the opinion of the judges, it was held by a majority of them (10 to 3), that the prisoner was properly convicted of rape.

According to the Scotch law, "the knowledge of a woman's person must be against her will, but it is immaterial whether her consent be forced by actual violence, or threats, or the administration of stupifying drugs." (See Alison's Principles of the Criminal Law of Scotland, p. 211); he quotes 1 Hume, 303; Barnett, 103. The first authority favours this view, the second is opposed to it. He mentions the case of Luke Dillon, 1830, where a person was convicted in Dublin, who had given a stupifying drug, &c.

Mr. Livingstone, in his Code, defines rape to be the carnal knowledge of a woman obtained against her consent, by force, menace or fraud; and he makes the carnal knowledge by fraud to consist, amongst other things, "in forcibly, or without her knowledge, administering to the woman who is injured any substance that produces an unnatural sexual desire, or such stupor as to prevent or weaken resistance, and committing the crime while she is under the operation of that which is so administered." Art. 463.

The present punishment for rape, and for the offence contained in Article 23, is transportation for life absolutely. We think this an objectionable punishment, and have therefore altered it to transportation for life, or not less than seven years, in the discretion of the Court.

ART. 19.

It is rape, although the woman consent to carnal knowledge, if such consent be given through fear of death or of grievous bodily harm. (*p*)

(*p*) Greater precision is here given to the present law, by indicating that compulsion must amount to fear of death or grievous bodily harm, which latter term is now reduced to a reasonable certainty.

ART. 20.

A husband cannot be guilty of committing, by his own person, a rape on his wife; but if another person commit the offence, he may be liable as an accessory, or for being present, aiding or abetting.

ART. 21.

Provided that no person shall be deemed to be a husband within the meaning of the last preceding Article where the woman shall have been compelled or shall have been by fraud induced, to go through the ceremony of a marriage, and either such ceremony shall be a mere nullity, (*q*) or the marriage shall by reason of such compulsion or fraud be declared to be void *ab initio* by a Court of competent jurisdiction.

(*q*) Perhaps the provision of the present law for the case where a marriage is declared void *ab initio* by a spiritual court does not sufficiently reach cases where Courts of common law would have no difficulty in determining that the marriage was a nullity.

ART. 22.

Whosoever by pretending to be the husband of any married woman, or knowing that any married woman believes him to be her husband, shall deceitfully and carnally know her, shall be punishable as for rape. (*r*)

(*r*) The majority of the Judges (See Rex *v.* Jackson, Russ. and Ry. 487) having declared that this offence is not properly a rape, it seems expedient to provide against it, by visiting it with the same punishment as rape.

ART. 23.

Whosoever shall unlawfully and carnally know and abuse any girl under the age of 12 years shall incur the penalty of the 2nd class. (*s*)

(*s*) See the 9 Geo. IV. c. 31, s. 17, which makes the carnal knowledge of girls punishable with transportation for life when under 10 years of age, and when above 10 and under 12 years of age, with imprisonment only. This distinction has appeared to us not to be warranted by any facts relating to the physical or mental puberty of a child or its capacity to consent: we have, therefore, omitted it and raised the age of a child upon whom the higher offence may be committed to 12 years. Alison, p. 211, says, "It does not very well appear why the period from 10 to 12 is the only one in a woman's life during which her person may be violated without peril to the offender's life."

ART. 24.

Whosoever shall administer to or cause to be taken by, any woman, any drug or other thing, with intent to render her insensible, or to produce in her an unnatural sexual desire or such stupor as to prevent or weaken resistance, in order that whilst in that state he or any other person may unlawfully and carnally know her, shall incur the penalties of the 10th class. (*t*)

(*t*) This article is a new provision.

ART. 25.

Whosoever shall commit the crime of buggery, either with mankind or with any animal, shall incur the penalties of the 2nd class. (*u*)

(*u*) See the 9 Geo. IV., c. 31, s. 15. These are not cases which seem proper to be punished capitally on any principles upon which capital punishments have been justified. We have, therefore, for the present reduced the punishment to that of the highest class of penalties short of death, viz., transportation for life, or not less than seven years; but we think that a long confinement, to be made as solitary as the mind of the prisoner can bear, the appropriate punishment for such offences. Some of the provisions regarding lunatic criminals may perhaps be thought useful in the treatment of such offenders.

ART. 26.

Any the least degree of penetration, although there be no emission of seed, shall be sufficient to constitute carnal knowledge in relation to the crimes mentioned in Articles 18, 22, 23, and 25. (*x*)

(*x*) See 9 Geo. IV. c. 31. s. 18.

ART. 27.

Whosoever shall assault any woman with intent to commit any of the crimes mentioned in Articles 18 and 22; or any girl, with intent to commit the crime mentioned in Article 23, shall incur the penalties of the 8th class.

ART. 28.

Whosoever shall assault any person, with intent to commit the crime mentioned in Article 25, or shall offer or make any solicitation, persuasion, promise or threat to any person, whereby to move or induce such person to commit or permit such crime, shall incur the penalties of the 8th class.

ART. 29.

An infant under the age of 14 years shall, notwithstanding anything in Chapter I., Section 1, Article 5 contained, be deemed to be incapable, by reason of impotency, of committing by his own person any of the crimes contained in Articles 18, 22, 23, and 25, or any assault with intent to commit by his own person any of those crimes. (*y*)

(*y*) It must be admitted that cases occasionally occur of youths under the age of 14 being capable of committing the crime to its full extent. But it appears inconvenient to leave the capacity as a question of fact to be tried by juries, and it is difficult to fix on any particular limits; we have therefore left the law in its present state.

ART. 30.

Whosoever shall, from motives of lucre, take away or detain against her will any woman in anywise intitled to any interest, legal or equitable, present or expectant, in any property whatsover, or being presumptive heiress or co-heiress, or presumptive next of kin, or one of the presumptive next of kin, to any one having any such interest in property, with intent to marry or defile her or to cause her to be married or defiled by any other person, shall incur the penalties of the 4th class. (*z*)

(*z*) See the 9 Geo. IV. c. 31. s. 19.

ART. 31.

Whosoever shall take away or detain against her will, any woman, with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person, shall incur the penalties of the 7th class. (*a*)

(*a*) We have extended the provisions of the present law, by making abduction penal, though it be not of heiresses or women entitled to property. We think that this very serious injury should not be made dispunishable, merely because the motives may have been sensual, or other than mercenary.

ART. 32.

Whosoever shall unlawfully take, whether with or without her consent, (*b*) any unmarried girl, being under the age of 16 years, out of the possession and against the will of her father, mother, or any other person having the lawful care or charge of her, shall incur the penalties of the 7th class. (*c*).

(*b*) 9 Geo. IV. c. 31, s. 20.
(*c*) R. *v.* Robins, 1 Car. and Kir. 456.

ART. 33.

Whosoever shall unlawfully lead or take away, or decoy or entice away or detain any child, under the age of 10 years, with intent to deprive the parent or parents, or any other person having the lawful care or charge of such child, of the possession of such child, or with intent to steal any article upon or about the person of such child, to whomsoever such article may belong; or shall, with any such intent, receive or harbour any such child, knowing the same to have been, by force or fraud, led, taken, decoyed, enticed away or detained as hereinbefore in this Article mentioned, shall incur the penalties of the 6th class. (*d*)

(*d*) 9 Geo. IV. c. 31, s. 21 in part.

ART. 34.

Provided, that no person who shall have in good faith claimed to be the father of an illegitimate child, or to have any right to the possession of such child, shall be liable to be prosecuted by virtue of the last preceding Article on account of his getting possession of such child, or taking such child out of the possession of the mother or any other person having the lawful charge thereof. (*e*)

(*e*) See the 9 Geo. IV. c. 31, s. 21; some doubt exists in the present law, with regard to the nature and circumstances of the *claim* of parentage.

ART. 35.

Whosoever shall maliciously send as prisoner or transport any subject of this

realm into any parts beyond the seas, whether within or without the dominions of Her Majesty, shall incur the penalties of the 4th class. (*f*)

(*f*) See 31 Car. 1, c. 2, s. 12, (the *Habeas Corpus* Act).

ART. 36.

Whosoever shall arrest any clergyman upon or under the pretence of executing any civil process, whilst he shall be performing Divine Service, or shall with the knowledge of the person so arresting, be going to perform the same or returning from the performance thereof, shall incur the penalties of the 9th class. (*g*)

(*g*) See the 9 Geo. IV. c. 31, s. 23.

ART. 37.

Whosoever shall be guilty of any unlawful restraint of the personal liberty of any other person shall incur the penalties of the 7th class.

ART. 38.

Whosoever shall maliciously or shall negligently, as hereinbefore in Article 5 of Section 2 of Chapter I. defined, cause any bodily harm, or do any violence to the person of another, shall incur the penalties of the 12th class.

ART. 39.

Provided that it shall be justifiable to do or omit anything the malicious doing or omission of which respectively is an offence within any of the Articles 3, 4, 6, 9, 11, and 38 of this Section, in every case where, had the person against or with respect to whom such thing is done or omitted respectively been killed, under the same circumstances, such killing would have been justifiable. (*h*)

(*h*) The rules of justification apply equally to minor personal injuries as to homicides; but in the Treatises they are commonly stated as though they related to homicide only.

ART. 40.

Provided also, that it shall be justifiable to cause bodily harm to any other person in any case where had such person been killed such killing would have been extenuated under Article 14 of Section 3 of this Chapter, if the party from whose act or omission such harm results neither intended the death of the person to whom such harm is caused to result nor believed that it would probably result from such act or omission. (*i*)

(*i*) Cases have occurred where persons have procured themselves to be circumcised for the purpose of being enabled to pass for Mahomedans whilst residing in Mahomedan countries; it is submitted that in such cases the surgeon who performed the operation should not be criminally responsible for the bodily harm inflicted.

ART. 41.

Provided also that no person shall be liable under any Article of this Section for negligently causing any grievous or other bodily harm or violence to any other person, in any case where had the party to whose person harm or violence is done been killed under the same circumstances, such killing would not have amounted to negligent homicide.

ART. 42.

Whosoever shall assault any other person, shall incur the penalties of the 13th class.

ART. 43.

An assault consists in any attempt, offer, or menace by gestures, to cause any bodily harm or to do any violence to the person of another, by one who has present ability to cause such bodily harm or to do such violence.

ART. 44.

Whosoever shall, in any case not provided for by this Act, attempt to commit any offence against this Act, by any assault or other act whatsoever done in part execution of a design to commit such offence, or with the immediate intent to accomplish the criminal object, shall, although he fail in such attempt, in case such attempted offence shall subject any person committing the same to the penalties of the 6th or any higher class of penalties, incur the penalties of the 7th class; and shall, in case such attempted offence shall subject any person committing the same to the penalties of any lower class, incur any penalties by fine or imprisonment or both, not exceeding one-half of those which he would have incurred had he committed such last mentioned attempted offence.

Art. 45.

If any injury, the causing of which is a crime within any Article of this Chapter, be intended to result, or if the party causing it believe it to be in any degree probable that such injury will result to one person, and through mistake or by accident it light upon another person, the party so causing such injury shall be punishable in the same manner as he would have been punishable had the person intended to be injured, or to whom it was believed to be in any degree probable that such injury would result, been the person injured. (*k*)

(*k*) The above Article may be thought to be an exception to the general rule, that accidental injuries are not punishable. Some principles have been stated, in books of authority, for the government of cases to which this Article relates which do not appear to rest on a very satisfactory foundation; as that a person "cannot apportion his own wrong;" that "*malitia egreditur personam*;" and that "illegal acts should receive an unfavourable construction."

The cases in question vary materially in circumstances. In some, a person, A., does an act, intending to kill B., or to shoot his tame fowl with intend to steal them, and by accident, within our interpretation of that term, (meaning thereby that A. could not by reasonable probability be supposed to have believed or even contemplated the result and that it was not owing to negligence,) kills C. Suppose, for example, that C. appearing suddenly, has placed himself between A. and B., or B.'s fowl. Here the question arises, is A. to be punished for the attempt to kill B. or for actually killing C.? The circumstances appear to be very different, where A., intending to kill B., who in fact, though unknown to A., is abroad, and A. kills C. (his friend or relative perhaps), mistaking him for B. Or where A., firing into a crowd, the shot kills C., the friend or relative of A., whom he would not voluntarily have injured.

Under the latter circumstances it cannot be doubted that, although in popular discourse the injuries might be termed accidental, or, to use Sir M. Foster's expression, "*beside the intention*," yet that the acts fall within our definition of wilfulness: the fatal consequences were the probable results of these acts. But in cases of the former description there can be no doubt that the injuries are accidental within our definition, and therefore, according to the general rule, would be dispunishable.

The principle on which it is conceived that accidental injuries ought not to be punished is that the punishment is almost inoperative, by way of example. And it seems a reasonable exception from such a rule, where it may appear that the punishment would deter persons from committing or attempting to commit the identical offence in which the person punished was engaged. If A. was attempting to kill a man, and he is punished for killing a man who would not have been killed but for such attempt; the punishment may be supposed to operate, by way of example, to deter others from killing or attempting to kill men. But if A. was attempting to pick a pocket, and, by accident, discharged a pistol in that pocket, whereby a man was killed, the punishment for murder would operate very remotely to prevent the crime of picking pockets. So if A. was shooting at B. and killed B's horse, the punishing of A. for shooting a horse would operate very remotely to deter persons from attempting to kill men.

The rule, upon whatever principle founded, has long prevailed, both in the English and Scotch law, as applicable to homicide. According to the English law, "the act done follows the nature of the act intended to be done; therefore if the latter were founded in malice, and the stroke from which death ensued fell by mistake or accident upon a person for whom it was not intended, yet the motive being malicious, the act amounts to murder." (1 East's P. C., c. 5, s. 17.) So "whenever a man happens to kill another in the execution of a deliberate purpose to commit any felony, he is guilty of murder; as where a person shooting at tame fowl, with an intent to steal them, accidentally kills a man; or where one sets upon a man to rob him and kills him in making resistance; or where a person shooting at or fighting with one man, with a design to murder him, misses him and kills another." (Hawk. P. C., b. 1, c. 31, s. 44.)

Mr. Alison (p. 50), speaking of the law of Scotland, where the killing is by mistake, says, "It is murder if the pannel shoot or aim at one person and by mistake kill another, if it would have been murder had the person aimed at died, or if he inflict death by such acts as may reasonably be expected to kill some person or another."

The same author, on the subject of killing in the attempt to commit another crime, says (p. 53), "The law of England on this subject recognizes a variety of distinctions which do not appear to have obtained a footing in our practice."

"Perhaps the safest rule that can be stated on the subject is that homicide, though not originally intended, will be held as murder which is committed during the commission, or in the attempt to commit a capital crime, or one obviously hazardous to life; but that where it ensues, without being intended, during the course of an inferior delinquency, and from which no peril to life could reasonably have been anticipated, it will amount to culpable homicide only."

If these rules be applicable to homicide, they seem equally to apply to other severe personal injuries: as, for example, if A. were attempting to put out B.'s eye, and by accident C. intervened, whose eye was put out by the thrust intended for B. But the application of these rules to other cases than homicide does not appear to have been noticed in the treatises, or to have been the subject of judicial decisions. See further on the subject of accidental injuries the note to Article 7 of Section 2 of Chapter I.

Art. 46.

If any injury, the causing of which is a crime within any Article of this Chapter, be intended to result, or the party causing it believe it to be in any degree probable that such injury will result to some person, but not to any person in particular, and it light upon any person, the party causing it shall be punishable in the same manner as he would have been punishable had the person injured been intended to be injured, or had the party causing such injury believed it to be in any degree probable that such injury would result to the person injured. (*l*)

(*l*) As where a man fires into a crowd and kills any of the persons composing it.

ART. 47.

A person shall be punishable in respect of any injury, the causing of which is a crime within any Article of this Chapter, although the act done or means used to cause it, take effect in a manner not intended nor believed to be in any degree probable by the person doing such act or using such means, provided he would have been punishable had such act or means taken effect in the manner intended or believed by him to be in any degree probable. (*m*)

(*m*) As where A. intending to kill B., puts poison in a bottle from which he knows B. to be in the habit of taking medicine, in order that B. under the impression that he is taking his accustomed medicine, may poison himself, and C., his servant, mistaking it for a condiment, mixes it with B.'s food, and so B. is killed. So in Reg. *v.* Michael, 2 Moo. C.C.R. 120, an indictment for the murder of A. B. by poison, stating that the prisoner gave and administered a certain deadly poison, was, upon a case reserved for the opinions of the Judges, held by them, unanimously, to be supported by proof that the prisoner gave the poison to C. D. to administer as a medicine to A. B.; but that C. D. having neglected to do so, it was accidentally given to A. B. by a child, the prisoner's intention throughout being to murder.

CHAPTER III.

DEFINITIONS OF TERMS AND EXPLANATIONS.

[On the completion of the Digest, this Chapter will of course be greatly enlarged, and some of the Articles will require modification.]

ART. 1.

THE terms following, wheresoever occurring throughout this Act, shall be understood as hereinafter defined: that is to say,—

The term "grievous bodily harm" shall be deemed to signify any harm whereby any organ of sense or any member of the human body is rendered permanently imperfect, the fracture or dislocation of any bone, or any bodily harm whereby the person to whom it is caused is, during the space of 20 days at the least, in bodily pain, diseased or unable to follow his ordinary calling or pursuits.

ART. 2.

The term "woman" shall be deemed to signify any female human being whatsoever may be her age.

ART. 3.

The term "judicial officer" shall be deemed to signify any judge, magistrate, or other officer invested with authority to decide matters submitted to him in the course of justice, according to law and right.

ART. 4.

Wheresoever throughout this Act, in describing any offence, or the offender, or the party affected or intended to be affected by any offence, words are used importing the singular number, or the masculine gender only, yet they shall be understood to include several persons as well as one person, and females as well as males, unless it be otherwise specially provided, or there be something in the subject or context repugnant to such construction.

CHAPTER IV.

CHAPTER OF PENALTIES.

[For the present we have adopted (subject to the alteration of the numbers of the classes rendered necessary by the limited nature of the present Digest) the classes of penalties contained in the Digest prepared by the former Commissioners, as being a great improvement upon the existing system of punishments; but the whole subject will have to be carefully considered before the completion of the Digest, and this chapter may then require considerable modification.]

ART. 1.

WHOSOEVER shall commit any offence for which it is declared by this Act that the offender shall suffer death, shall, on lawful conviction thereof, be adjudged to suffer, and shall suffer according to the provisions of the first class of penalties hereinafter set forth.

ART. 2.

Whosoever shall commit any offence for which it is declared by this Act that the offender shall incur the penalties of any specified class of the penalties hereinafter set forth, shall, on conviction thereof, be adjudged to suffer, and shall suffer the penalties of the particular class so specified, according to the provisions of such class; and such penalties, where discretionary, and the extent or amount of such penalties, where the extent or amount is discretionary, shall respectively be at the discretion of the Court.

ART. 3.

Each of the several classes of penalties hereinafter set forth shall be deemed to be a higher class than any class which numerically follows it.

ART. 4.

Whosoever shall, without collusion, have been summarily convicted by virtue of any Act or Acts of Parliament, of any offence which is also an offence within any Article of this Act, and shall have paid such fine and costs, or received a remission thereof from the Crown, or have suffered such imprisonment as such offender shall have been adjudged to pay or suffer respectively, or shall have been discharged from such conviction according to law, shall not be liable to be again punished under any Article of this Act.

ACT. 5.

The classes of penalties hereinafter set forth shall not be deemed in any to affect any law concerning forfeiture, or any other collateral consequence to which an offender is now liable on a conviction of any offence which is an offence under this Act; nor to extend any such law or consequence to any offence, which is an offence under this Act, not now liable to the same. (*a*)

(*a*) This Article is only a temporary one until we shall have had an opportunity of considering the best mode of dealing with the law of forfeiture, to the retaining of which the present as well as the former Commissioners are strongly opposed.

ART. 6.

The classes of penalties to which offenders shall be liable under the provisions of this Act are the following:—

1st Class.

The offender shall be hanged by the neck until such offender be dead; and, in addition, upon a conviction of murder, the body of such offender shall be buried within the precincts of the prison in which such offender shall have been confined after conviction. (*b*)

(*b*) 2 and 3 Will. IV. c. 75, s. 16; 4 and 5 Will. IV. c. 26.

2nd Class.

Transportation for life, or for any other term not less than seven years.

3rd Class.

Transportation for life, or for any other term not less than seven years, or imprisonment for any term not exceeding three years nor less than one year.

4th Class.

Transportation for life, or for any other term not less than seven years, or imprisonment for any term not exceeding three years.

5th Class.

Transportation for any term not exceeding ten nor less than seven years, or imprisonment for any term not exceeding three years.

6th Class.

Transportation for the term of seven years, or imprisonment for any term not exceeding three years.

7th Class.

Imprisonment for any term not exceeding three years, or fine at discretion, or both.

8th Class.

Imprisonment for any term not exceeding three years.

9th Class.

Imprisonment for any term not exceeding two years, or fine at discretion, or both.

10th Class.

Imprisonment for any term not exceeding two years.

11th Class.

Imprisonment for any term not exceeding eighteen months, or fine at discretion, or both.

12th Class.

Imprisonment for any term not exceeding one year, or fine at discretion, or both.

13th Class.

Imprisonment for any term not exceeding six months, or fine at discretion, or both.

ART. 7.

Where any person shall be convicted of any offence punishable under this Act, for which imprisonment may be awarded, it shall be lawful for the Court to sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at any one time, or three months in any one year, as to the Court in its discretion shall seem meet.

ART. 8.

Nothing in this Act contained shall extend to any offence committed in Scotland or Ireland.

We humbly submit this, the Second Report of the Commissioners, to your Majesty's Royal Consideration,—

EDWARD RYAN, (*L.S.*)
THOMAS STARKIE, (*L.S.*)
ROBERT VAUGHAN RICHARDS, (*L.S.*)
H. BELLENDEN KER, (*L.S.*)
ANDREW AMOS, (*L.S.*)

Received the 14th day of May, 1846,

LYNDHURST, C.

NOTE BY THE UNDERSIGNED COMMISSIONER.

I am desirous of explaining my reasons for dissenting, as I have in some instances done with great reluctance, from my coadjutors under the present commission, in respect of some alterations and additions proposed by them. I am far from presuming that in any such case dissent on my part would be deemed to be of any importance when weighed against the opinions of my colleagues; I consider it, however, to be my duty, at all events, to intimate such dissent where it exists, and to state the grounds of dissent, with a view to show that it has not resulted from want of diligent endeavour faithfully to execute my share of the duty prescribed by the commission.

CH. I.—It would, I conceive, be desirable that, previously to the statement of any particular exceptions, a general rule should be laid down to the following effect:—

"All persons shall be deemed to know the law, and to be criminally responsible in respect of anything done or omitted against the law, except as is hereinafter enacted."

With respect to CH. I., SECT. 1, ART. 2.—"No person shall be criminally responsible for any act or omission, who, at the time of such act or omission, by reason of unripeness or weakness of mind, or of any unsoundness, disease, or delusion of mind, wants the capacity, which the law otherwise presumes every person to possess, of discerning that such act or omission is contrary to the law of the land."

It appears to me that this Article ought to extend to incapability of discerning that the act or omission was *wrong*.

A great majority of the authorities make incapacity to discern that the act or omisson was *wrong* essential to impunity.

See Haw. b. i. c. 1, s. 1, who uses the words "a natural incapacity of distinguishing between good and evil."

Le Blanc, J., in Bowler's case, "capable of distinguishing right from *wrong*."

Mansfield, C. J., in Bellingham's case, "incapable of judging between right and *wrong*." And again, "did not consider that murder was a crime against the laws of God and Nature."

Lord Lyndhurst, in Offord's case, "Did he know that he was committing an offence against the laws of *God and Nature*?"

Lord Denman, in Oxford's case, "whether the prisoner was quite unaware of the *nature, character*, and consequences of the act he was committing?"

The judges, in their answer to the questions propounded to them in the House of Lords as to the questions to be submitted to a jury, when a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons is charged with the commission of a grievous murder, *e. g.*, and insanity is set up as a defence? And, in what terms ought the question to be left to the jury as to the prisoner's state of mind at the time when the act was committed? say (*inter alia*) "it must be clearly proved that at the time of the committing of the act the party accused was labouring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or if he did know it, that he did *not know that he was doing wrong*. The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused, at the time of doing the act, knew the difference between right and wrong, which mode, though rarely if ever tending to any mistake with the jury, is not, we conceive, so accurate when put generally, and in the abstract, as when put with reference to the party's knowledge of right and wrong in respect of the very act with which he is charged. If the question were to be put as to the knowledge of the accused, solely and exclusively with reference to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to conviction; whereas the law is administered upon the principle that every one must be taken conclusively to know it, without proof that he does know it. If the accused were conscious that the act was one which he *ought not to do*, and if that act was at the same time contrary to the law of the land, he is punishable; and the usual course, therefore, has been to leave the question to the jury, whether the party accused had a sufficient degree of reason to *know that he was doing an act that was wrong;* and this course we think is correct, accompanied with such observations and explanations as the circumstances of each particular case may require."

In conformity with the admirable opinion above referred to, as delivered by Tindal, C. J., in answer to the questions proposed by the House of Lords, it appears to me that it would be advisable to alter the Article as above suggested, by adding, after the words "delusion of mind," the words "*is unconscious that such act or omission is wrong.*"

It may perhaps appear to be superfluous, if not presumptuous, that I should offer any arguments in support of authorities so decisive; as the question, however, has been deemed to be still open for consideration, and the Article proposed differs from, what I may perhaps for the present be allowed to term the existing law, I venture to subjoin a few remarks in explanation of my dissent from the proposed Article, not merely on the score of authority, but of principle.

It is urged that the present rule affords an unjust test of liability, inasmuch as no person ought, in point of natural justice, to be amenable to criminal laws who is incapable of discerning that he contravenes those laws. Assuming this position to be true, it cannot be admitted that the present test is opposed to the principle contended for; for it may be presumed that a party who possesses a moral sense of wrong—who *knows* that an act is contrary to the moral law—is *capable* of knowing that the same act is contrary to the law of man.

It cannot be supposed that a mind which actually comprehends the force of moral restraint, and the mandates of natural justice, can be incapable of understanding an expressed law of the land to the same effect.

The present law, therefore, makes none of unsound mind amenable to criminal justice, who would not be so within the operation of the principle contended for.

Were it, however, uncertain whether a mind fully cognizant that an offence, *e. g.*, that of murder, was a sin against God, but still incapable of understanding that the same offence was prohibited by the law of man (a state of things which I can scarcely conceive to be possible), I am by no means prepared to admit that the offender would not be justly liable to punishment.

Such an offender could not, by reason of his ignorance of the law of the land, be in a better situation than that in which he would have stood had no such law existed, and men had lived in a state of nature.

On this subject Locke (Essay on Civil Government, 202) observes: "And thus it is that every man in a state of nature has a power to kill a murderer, both to deter others from committing the like injury, which no reparation can compensate, by the example of the punishment that attends it from everybody; and also to screen men from attempts of a criminal who, having renounced reason, the common rule and measure God hath given to mankind, hath, by the unjust violence and slaughter he hath committed upon one, declared war upon mankind."

It would be a great misfortune to society if, in truth, a class of persons existed who, knowing right from wrong, could be supposed to be incapable of discerning what was contrary to the law of the land, and were therefore to be left unrestrained by penal laws, that is, were permitted to gratify the worst passions with impunity, a licence which would not be tolerated even in a state of nature. I deem it, however, to be unnecessary to pursue this topic, conceiving that, even upon the principles admitted by those who think an alteration in the existing rule to be desirable, the test may be supported.

It may be also observed, that the *proposed* rule is an imperfect one in this respect, viz.:—that as expressed, it makes abstract capability of discerning what is contrary to law, the test of criminal liability, without any exception made in favour of one who, though possessing such feeble faculties as might possibly by extrinsic aid, enable him to discern that an act was contrary to law, was yet destitute of all internal means of attaining to such knowledge, and who, consequently in the absence of such external aid, was, in point of natural justice, no more amenable to criminal censures than he would have been had he been entirely and generally incapable of such discernment.

It is further urged, that the present is an obscure and uncertain test; for it is said, that a law may be merely positive, not being founded on any breach of natural or moral justice. This, no doubt, may frequently happen; but then the only consequence is, that the consciousness of moral wrong in such case ceases to be a test of liability. It does not follow that because the test may not be applicable as to one class of cases, it is to be rejected in others when it is a proper and useful test. The test may be useless where the crime consists in the killing of a wild beast, but may be an excellent one where it is applied to the killing of a man.

Consciousness of moral wrong is but a portion of the present rule, although it may in some cases be a decisive test; the party, although the test be inapplicable, is still liable if he be conscious that his act is contrary to the law of the land; and by virtue of the general presumption of law, he must be taken to know this if he possess capacity to know it,—that is, if he be *capable* of discerning that the act is unlawful; if he be so capable, unconsciousness is *not* by reason of unsoundness of mind.

The *proposed* rule is, as it seems to me, a more uncertain and difficult one than that which now exists. The jury is to find whether the accused be capable of discerning that what he does is contrary to the law of the land: it is not meant by this that the jury should find whether the accused had capacity to discern the existence and bearing of some particular law upon his act, yet this is a mistake into which a jury might easily fall if they were directed to find according to the terms proposed: if the question be as to general incapability to discern the law of the land, without providing any particular test, the inquiry is one of a vague and indefinite nature.

It is further urged, that the punishment of those who are incapable of discerning that what they do is contrary to law, cannot operate by way of example to deter those who are so incapable. It seems to me, as I have already stated, that the present law does not apply to those who are so incapable; and even were this otherwise, still the punishment might have the effect of deterring such as *knew* that their acts were wrong, and as such, punishable.

In conclusion, the proposed rule is in effect but the enunciation of a general principle, and is, as it seems to me, objectionable as a substitute for the existing rule, inasmuch as it does not recognize, if it do not absolutely even repudiate, an useful test of deciding by the aid of a jury on criminal liability in cases of doubtful sanity. By the general rule of law, every one is presumed to know the law. Natural justice, it is urged, interposes an exception where the presumption is effectually excluded by such defect of mind satisfactorily proved as excludes the presumption; but the rule of exception is commensurate with the principle of exemption, and therefore leaves a party who is capable by his own exertion of knowing the law to the operation of the general rule. This seems to be the clear principle of the law as regards partial sanity: the existing rule is founded on this principle, and further supplies an useful though not an universal test for applying it; the proposed rule does not strictly accord with the principle, and disregards, if it do not exclude, a test recognized by the existing law.

Ch. I., Sect. 1, Art. 9.—"No woman shall be liable to conviction in respect of any act of receiving her husband, or of receiving any other person in his presence, and by his authority, or of harbouring or concealing her husband, or any other person in his presence and by his authority, or of aiding the escape of her husband from justice."

It appears to me that the Article included in the Digest contained in the Criminal Law Commissioners' Seventh Report, relating to marital coercion, ought to be retained. A presumption of this nature in favour of a wife seems to stand upon a sound intelligible principle, and ought not, in my opinion, after having been sanctioned by the law for so long a period, to be overturned without satisfactory reasons for the alteration. The grounds of entertaining such a presumption have already been considered.

After paying great attention to the suggestions of my learned colleagues, I am unable to discover any sufficient grounds for depriving married women of the protection from the consequences of marital coercion, as proposed to be afforded by the Article above alluded to. The difficulties experienced by magistrates can scarcely warrant the abolition of a well principled and humane rule. The difficulty of defining marital coercion rather suggests the expediency of a peremptory rule within certain limits. The supposed hardship of a married woman's not being entitled to the benefit of the presumption, though she were influenced by the strongest menaces on the part of the husband, whom she knew to be near at hand, would, were the law such, scarcely justify the further severity of considering the wife to be amenable when the husband was present and in view.

The arguments, "that the rule may be thought to offer an inducement to criminals to employ their wives to assist them in the execution of petty offences, and to prevent their wives from exercising the resistance and influence in their power," are no doubt entitled to attention, but, in my humble judgment, are too subtle and remote to be weighed fairly against the injustice of punishing a wife as a criminal in respect of acts done by her which may fairly and reasonably be attributed to coercion.

Finally, I have to observe, that the above Article (9 of Sect. 1. of Chap. I.) is founded on the very principle of affording protection to the wife in case of marital coercion, even to the extent of treason, in harbouring and concealing a stranger known to have committed treason.

Ch. I., Sect. 2.—"*Of Wilful, Malicious, and Negligent Injuries.*"—The object of this and of the following section is to lay down general rules, first, as regards the *mens rea*, that material element of crimes which consists in criminal intention or culpable negligence, and the distinguishing their consequences from such as are merely accidental; and, 2ndly, as regards the mere *act* or *omission* essential to a crime. The description at the head of Section 2 " of wilful, malicious, and negligent injuries," appears to me to be objectionable, because it fails to assign to the section its true and essential character; the section does not treat of criminal injuries in the ordinary sense of the word, but only of criminal intention and culpable negligence as ingredients in crimes, and of accidents attributable neither to criminal intention nor to culpable negligence.

Ch. I., Sect. 2, Art. 1.—" An injury shall be deemed to consist in any harm, damage or other evil consequence, caused to any person in body, mind, reputation, property or right, or any harm, damage or other evil consequence caused to the State or Public."

Art. 2.—" An injury resulting from an omission does not subject the person causing it to punishment, unless such omission be unlawful. An omission shall be deemed to be unlawful whensoever it is a breach of some duty imposed by law, or *gives cause for a civil action.*"

The term injury, whether its classical origin, or its legal or ordinary use be regarded, properly signifies some unlawful hurt, and it is, I conceive, incorrectly applied, to signify merely a hurt, damage or evil consequence. In the first of the two preceding Articles the word is used in an unrestricted sense, including harm or damage, or evil consequence generally, whether lawful or unlawful; but in Article 2, the term is in effect and operation limited to damage resulting from wrong; that is, to the proper but limited and confined sense of the term injury. The term injury is, therefore, used in this Article in a sense different from either of the senses in which it is used in the title of the Section, and in the first Article.

If, however, it be intended to confine Article 1 to such hurts only as are prohibited by law, the Article itself amounts merely to a circuitous definition of injury, which might be more briefly and effectually done by defining it to consist in some hurt, damage, or evil consequence done contrary to law; the rest is a necessary consequence of its being contrary to law; for if it be so, it must be either to the State or public, or to persons; and as regards persons, must be in mind, body, &c. It is also observable that the use of the term is confined, contrary to ordinary acceptation, to consequences of acts, to the exclusion of the acts themselves. By the latter branch of the same Article, an omission, which would give cause for a civil action, *may*, if damage result, be the subject of punishment, and, therefore, criminality *may* turn upon the question, whether a civil action be or be not maintainable? It is not, however, defined by whom such action is to be maintainable, or against whom, in order to support this consequence—or whether the liability it may be to capital punishment, is to depend on a statute of limitations or of frauds, or upon any of the nice and doubtful points on which a cause of action so frequently hinges. It appears to me that it would not be safe to introduce so indefinite a provision—the more especially when it is considered that on a charge of murder, the guilt or innocence of the prisoner may depend altogether on the operation of this rule. Without in the slightest degree presuming to dispute the propriety of the observations of Mr. J. Patteson, in the case of the Queen *v.* Marriott. I venture to observe, that neither the circumstances of that case, nor any rule of law expounded by the very learned person who tried it, justifies the terms of the above Article. It is observable that in the case of the Queen *v.* Marriott, and many others of a like character, the question is not one simply of *omission*, but of *acts* and omission. I conceive that in all such cases the law regards the *whole* transaction, without looking to the mere actionable or even criminal quality of an omission conducing to the result; and that it is not at all essential to criminal homicide that the omission from which death results should be either of an actionable or indictable omission.

It is observable that an Article regarding such unlawful omissions in the case of homicide was recommended in the 7th Report of the Commissioners on Criminal law, which is omitted from the present Digest. I apprehend it to be a general principle, that a man who by his act has rendered aid necessary to relieve life from immediate peril, is bound to afford that aid.

Ch. I., Sect. 2, Art. 6.—" An injury shall be deemed to be accidentally caused whensoever it is neither wilfully nor negligently caused. Accidental injuries do not subject the persons causing them to punishment, except as is hereafter in this Act mentioned."

It may be proper to observe, that the term *accidentally*, as used in this Article, is applicable not to hurt or damage done, but is used simply to signify that the party who, in a physical and mechanical sense, did the act, did not do it either wilfully or without due caution. If A., having the custody of wholesome medicine, deposits it in a place of apparent safety, and B. maliciously and secretly substitutes poison, in order that it may be administered to C., and A. in ignorance of the change, administers the poison to C., and C. dies of the poison, the result, according to the definition is, as regards A., accidental, but the *result* is not accidental, and the act, *as regards B.*, is wilful.

The latter branch of this Article seems to me to be unnecessary. No injuries whatever are punishable except such as are in the Act afterwards mentioned, and therefore it might seem as though it were intended to make an exception as regards accidental injuries, and this is not intended. This branch of the Article is also, as it seems to me, objectionable, as tending to the inference that any hurt or damage merely accidental may be criminal, no such hurt or damage is, *per se*, ever criminal, unless it result from the doing, or endeavour to do some unlawful act. I conceive that, on this foundation, an Article ought to be constructed to the following effect:—

" No one shall be criminally responsible for any hurt, damage, or evil consequence which results accidentally from the doing a lawful act."

It is observable that such an Article merely excludes responsibility where the *act is lawful* and the *consequence accidental*, but does not make *all* hurtful results from unlawful acts penal. I deem it to be necessary expressly to make this observation in order to exclude misapprehension; and for further explanation on this point refer to the latter paragraphs of p. 56.

It appears to me to be also desirable to include an Article in reference to cases where the mere act of destruction or damage is *wilful*, but is *excusable* on the ground of mistake, due caution having been used. Such an Article may be in substance as follows:—

" A hurt or damage shall be deemed to be excusable within the meaning of Article ( ) whenever it shall have resulted from *ignorance or mistake in fact*, due caution having been used."

The expediency of such a provision is founded on the consideration that a damage may be *wilful* within the meaning of Article 3, because the party intended to cause that physical consequence to

which his act was adapted, and which he really intended to cause, and yet, by reason of his ignorance of collateral circumstances, be justly excusable. Thus, if a man were wilfully to shoot a horse, believing it to be his own, when in truth it belonged to another, the act of killing would be wilful, as he intended to kill the very horse aimed at; but yet he ought to be excused from the severe penalties attached to a malicious killing, if, without want of due caution, he believed the horse to be his own, as if, intending to shoot his own horse, he directed a servant to bring him that horse, and the servant wilfully substituted the horse of another person resembling his master's, without informing him of what he had done. It may perhaps be doubted whether, in strictness, such a provision be essential to the excuse of a party who so acted in ignorance, that is, whether the term *wilful* must not be taken to mean not only wilful as regards the *mere physical consequence* caused, but also as regards *loss to another*, resulting from such physical consequence. According to the strict terms of the definition, the meaning rather seems to be confined to the mere physical consequence. If so, the suggested provision is necessary, and it appears to me to be at all events expedient; its insertion cannot do harm, its omission may be productive of doubt, if not of injustice.

It seems to me that these provisions will complete the object of the 3rd Section, in the defining criminal intention and culpable negligence, and at once excluding criminal responsibility in respect of any hurt or damage which does not result either from a wilful and criminal intention, culpable negligence, or from some criminal act or omission.

Ch. II., Sect. 1, Art. 8.—"It is homicide, although the death be not directly caused by the injury done, nor, as is mentioned in the last preceding Article, by a disease or disorder ensuing from such injury, but by some distinct bodily injury, disease or disorder, resulting from the treatment of the original injury, provided the injury, disease or disorder resulting therefrom were not negligently caused within the meaning of Article 5 of Section 2 of Chapter I. of this Act."

I understand this Article to provide, that if bodily hurt be done which renders medical or surgical aid reasonably necessary, and the patient die, not of the original injury, or any disorder arising from it, but from medicine administered or an operation performed, the party who inflicted the hurt shall be liable as for homicide. So that if A. inflicted a wound on B., and a physician deemed it to be necessary to administer a strong medicine, from the effect of which, and not from that of the wound, B. died, and no blame were imputable to the physician, A. would be responsible as for killing B.; in other words, that having by his wrongful act induced a reasonable necessity for administering the medicine, he ought to be considered as having indirectly killed B. I venture to suggest a doubt as to the policy of an enactment in the terms above proposed; these would induce the necessity of inquiry upon the question, whether the treatment had been judicious, or otherwise, for it is not proposed to extend the law still further, to embrace cases where the treatment was improper.

The provisions for the protection of the person from malicious injuries render it the less important to extend the law of murder beyond its ordinary limits.

Ch. II., Sect. 3, Art. 7.—"Whensoever the killing of an officer or other person is not extenuated within the meaning of the last preceding Article, if such officer or other person be lawfully executing any writ, warrant or process, civil or criminal, or if such officer be lawfully acting in obedience to the command of a magistrate, or otherwise lawfully acting under authority for the advancement of the law, it is not extenuated, although such writ, warrant or process be not sufficient in law, or such command be unlawful, or such officer have no such authority as aforesaid, or the manner of executing such writ, warrant, process, command, or other authority be unlawful, provided such officer or other person *believed* himself to be respectively lawfully executing such writ, warrant or process, or lawfully acting in obedience to such command or otherwise under authority for the advancement of the law; and provided the party killing had notice that such officer or other person purposed to act under the authority of such writ, warrant or process, or in obedience to such command or otherwise for the advancement of the law."

This Article, as well as the Articles 8 and 10 of the same Section, and Article 14 of Section 5, are founded upon the principle of affording increased protection to officers of justice acting *bonâ fide* in the execution of their duty, and inducing submission to the acts of such officers in the first instance, even although their authority or the mode of executing it be defective. These objects are, no doubt important, sufficiently so to call for full and distinct consideration as to the best mode of attaining to them. The subject, however, is one requiring the utmost caution, lest the licence given to mere ministerial officers of the law should be increased to an extent dangerous to personal safety and liberty, the more especially as officers who abuse their authority in the execution of process, or commit wrongs under colour of executing legal authority, are seldom of sufficient ability to render compensation in a civil action for damages. It seems to me that the objects proposed cannot be conveniently or justly attained to by the indirect enactments above referred to, and that they are objectionable as being inconsistent with the general spirit of our laws, and would be harsh in their operation. The substance of Article 7, c. 2, s. 3, in conjunction with Article 14, c. 2, s. 5, is to exclude a party killing an officer, not only from his plea of *justification*, but even of *extenuation*, if such officer believed that he acted lawfully, and gave notice of his purpose, however illegal the warrant itself might be, or even in numerous cases when he acted without any authority at all, or to the question whether such officer had used due and reasonable means to obtain such information and instructions as might enable him legally to execute his supposed authority, and without regard to the apparent illegality of the process or the demeanour of the officer, or the extent to which the party killing may have been provoked and excited by oppressive and irritating conduct.

An ignorant officer of a petty Court may suppose that he is justified in arresting a party in a place beyond the limits of the Court's jurisdiction, and, moreover, that he has a right to secure his person by putting handcuffs upon him in a public street; or a constable may suppose that he is entitled to break into a gentleman's house and ransack his cabinets, chests, and most secret repositories, under a general search warrant for libels improvidently issued by a justice of the peace; suppose then that the party, being fully aware that the conduct of the bailiff or constable is altogether illegal, resists; that a conflict ensues, and that the party cannot otherwise preserve his valuable securities, liberty, or even his life, kills the assailant—such killing, as the law now stands, would be not merely regarded as *extenuated*, but *justified*. According to the Articles above alluded to, the party so killing would not be justified, although he had done no more than the law now allows every man to do in defence of his personal liberty, and even what the proposed law would allow, but for the ignorance of the bailiff. The proposed alteration does not, however, rest here, in thus depriving an injured party of his plea of justification

but even excludes him from his plea of *extenuation*, and thus subjects him to *capital punishment*, although he has been provoked, it may be, beyond the power of self-control by harsh and violent treatment, which he knows to be illegal. Such provisions seem to be objectionable, even as regards the object aimed at, to secure submission to persons professing to act under legal authority; the direct course would seem to consist at once in rendering forcible resistance, in every such case, illegal: this is not done, resistance *even to death* is to remain legal, unless the officer acted in ignorance of the illegality of his act, and so even if he acted *bonâ fide*, unless death or grievous bodily harm resulted; and as such a result is rarely contemplated, in the first instance, where an officer is resisted, it is probable that the remote expectation of such a result would have but little practical effect in preventing resistance, still less so, as although death resulted, the party who resisted, knowing that the officer was acting illegally, might well presume that the officer himself knew that he so acted, and consequently that his own resistance was justifiable. Let it, however, be supposed, that, on inquiry, it turned out that the officer, though he acted illegally, was in truth acting *bonâ fide*, it would, I conceive, be unjust to subject the resisting party to capital punishment; his guilt, in such a case, would be made to depend on a fact which he had no sufficient means of ascertaining, viz., *the belief of the officer* as to the legality of his own conduct, and when, indeed, he might justly be presumed to know the illegal quality of his own act.

The punishing the killing of the officer with such extreme severity, in case it turned out that the officer acted in *bonâ fide* ignorance, would scarcely be consistent with the consideration that up to the time of the death the law would regard resistance in such a case as legal, and to this extent encourage resistance. In case such resistance was successful, and the party escaped without killing the officer, not only would the resistance used be deemed justifiable, but the party who resisted would be entited to recover damages for the assault and violence used.

The latter branch, "if upon resistance unlawfully made," seems to be incapable of any just application, inasmuch as resistance to the execution of an unlawful warrant, &c., is not illegal.

It appears to me that provisions to be framed in order to remedy the evil of resistance to the execution of legal process ought, first, to be direct; secondly, they ought to state explicitly the circumstances under which resistance is to be deemed to be illegal; thirdly, they should amply provide for compensation to the party injured, and thus compelled to surrender himself, and that from the public purse, if necessary; fourthly, that abuses on the part of officers should be severely punished.

Ch. II., Sect. 3, Art. 8.—"Homicide is extenuated where an officer or other person believing himself to be lawfully executing any writ, warrant or process, civil or criminal, or where an officer believing himself to be lawfully acting in obedience to the command of a magistrate, or to be otherwise lawfully acting under authority for the advancement of the law, although in fact such writ, warrant or process, be not sufficient in law, or such command be unlawful, or such officer have no such authority as aforesaid, or the manner of executing such writ, warrant, process, command or other authority be unlawful, is forcibly resisted, and using no more force than is necessary to overcome such resistanse, kills the person so resisting, or, being by reason of the violence opposed to him under reasonable fear of death if he proceed to execute that which he believes to be his duty, and because he has reasonable cause for believing that he cannot otherwise execute that which he believes to be his duty and preserve his life, kills him who so resists, provided the party killed had notice that such officer or other person purposed to act under the authority of such writ, warrant or process, or in obedience to such command or otherwise for the advancement of the law."

Observations similar to those made on the last preceding Article are applicable also to the present, but in a different degree; inasmuch as the former deprives a party, whose liberty has been unjustly invaded, of the plea of extenuation, if the officer believed that he was doing right. The present operates *in favorem vitæ*.

It may well be doubted, however, whether such an indirect course of inducing present submission to those who profess to be armed with legal authority, be politic. Greater protection is afforded to the officer, but not without danger to the security of others.

The natural tendency of impunity to officers in doing wrong is to render them less careful and circumspect in the discharge of their duties than they would otherwise be.

Ch. II., Sect. 3, Art 14.—"Homicide is extenuated whensoever the killing is wilful, but the act from which death results was done, or the act from the omission of which death results, was omitted at the request, or with the consent of the part killed."

Art. 15.—"Provided that Homicide shall not be extenuated within the meaning of the last preceding Article, where the party killed is in a state of idiotcy, or is by reason of unripeness or weakness of mind, or of any unsoundness, disease or delusion of mind, or of passion incapable of discerning the nature and consequences of his consent; or where such consent is extorted by the party killing; or where the party killing has reasonable cause for believing that such consent is given, in consequence of some false impression in respect of facts on the part of the person killed at the time of his giving such consent."

I cannot concur in recommending the above Article which constitutes the consent, on the part of the party killed, an extenuation of the offence. I conceive, that in point of religion and morals, the crime of murder comprehends the wilful destruction of a human being, whether it be with or without his consent.

"It is" (says 'Locke, Essay on Civil Government,' p. 347) "out of a man's power so to submit himself to another as to give him a liberty to destroy him; God and Nature never allowing a man so to abandon himself as to neglect his own preservation; and since he cannot take away his own life, neither can he give power to another to take it." Again he says, chap. iv., sec. 23, "Nobody can give more power than he has himself, and he that cannot take away his own life, cannot give another power over it." If this be just, if according to the moral law a party has no power to consent that another shall destroy him, it must be a grievous moral wrong that any other person should destroy the consenting party, or even that his offence should be extenuated by such consent given.

Such destruction is not, however, merely a sin, but a crime against society of the most dangerous character to life. Insecurity to life is admitted to be an evil calling for the greatest severity of punishment against offenders; and I cannot but think that were the question to be examined even on this ground alone, the result would be against the proposed alteration.

The law could not be relaxed, even where consent was given, without considerably diminishing the general efficacy of the law as a moral as well as merely penal protection; and it is very questionable whether the change would not be attended with very serious diminution of protection to life, and in-

creased apprehensions of danger. The plea of consent would probably be not an infrequent, and certainly a dangerous one; so difficult would it be to ascertain the real circumstances under which consent had been given, and to discover the arts really used for procuring consent, or rebutting slight evidence of consent, where the sufferings of a party from bodily disease or mental distress might render consent not improbable.

The provisions contained in Article 15, with which it has been deemed necessary to guard the proposed alteration, sufficiently attest the questionable nature of such a defence, and not only show with what jealousy it would require to be constantly guarded, but also prove the difficulty of guarding effectually against most atrocious practices against human life which might be practised under colour of such a consent.

Ch. II., Sect. 3, Art. 16.—"Homicide is extenuated where, if two persons deliberately agree to fight, a contest ensues, and one of them is killed: Provided that if such contest be with deadly weapons, the party killing shall incur the penalties of the 2nd class."

If the objection already urged against the plea of extenuation where a party is killed by his own consent be just, it is decisive also on the present question. A duel is but a compact by which each party gives leave to the other to kill if he can. I venture to add a few additional observations.

Looking to the motives by which duellists and the juries who try them are usually actuated, and the probable moral result of the proposed alteration, its adoption appears to me to be inexpedient. Experience leads to the conclusion that the practice is not controllable by mere penal laws. A party in a duel is usually influenced by one or other of two motives: he acts in a spirit of resentment arising from unredressed injury, or in deference to the law of public opinion. Where the law gives no redress for a severe injury to the feelings, as, for instance, a sister's dishonour by deliberate seduction, the brother, to satisfy his own revenge, or it may be in expectation of effacing the stigma on his family, has recourse to arms, and should he kill the seducer, although the criminal law may denounce him as a murderer, the law of public opinion views the offence very differently. Juries, in such cases, are influenced by considerations which the law cannot possibly estimate or recognize, and it is impossible that they should not be sensible that, however deplorable the appeal to arms may be, the practice is not without some degree of salutary effect in restraining men from the infliction of severe wrongs and intolerable insults, against which the law can afford no adequate protection. Hence arises a wide and necessary difference between the penal law and the laws of honour and of public opinion—a difference which can never be wholly reconciled, although some approach to it may be made by extending the sphere of legal protection against injuries to the feelings, and which difference, when it prevails to a great extent, greatly weakens the effect of the penal law.

The impossibility of preventing the practice of duelling by subjecting offenders to even the severest measure of punishment does not, however, by any means warrant any legislative extenuation, except it can be founded on circumstances which the law can recognize, as in the case of grave provocation; the law cannot be moulded for this purpose to agree with the laws of honour or of public opinion, and where this cannot be done, the case must stand as though no ground for extenuation existed. It is urged as an argument for extenuation that the punishment for a very serious injury to society (by killing a man in a duel) is now impracticable, and it is assumed that the offence will be repressed by making the proposed alteration. I cannot accede to this opinion. I believe that duels arise from motives (to which I have already alluded) which are beyond the control of mere penal laws; and it seems to me to be probable that where juries would, under the influence of considerations such as have been suggested, evade if possible the conviction of a party to a duel fairly fought where the offence was capital, they would give the same verdict although the offence were punishable only with transportation. To inflict a slighter punishment by fine, or even a term of imprisonment, would be to trifle with so grave a crime.

Whilst, as it seems to me, little good could be expected from the proposed alteration, it might, I think, be productive of much harm in a moral point of view. It would be understood to manifest an alteration in the opinion of the Legislature, as to the heinousness of the crime of homicide, and of course tend to diminish the efficacy of the law against it. I am induced briefly to express my opinion on the subject of the particular alteration of the general law concerning homicide which has been proposed, but with considerable reluctance, not, indeed, because I doubt as to the inexpediency of the change, but because it is a question of moral and public policy which is scarcely a fit subject for discussion in a mere note to a proposed Article, (in a Digest of the present law,) and is, I conceive, scarcely within the scope of the present Commission.

Ch. II., Sect. 4, Art. 3.—"Death shall be deemed to result from want of reasonable caution within the meaning of the last preceding Article, where it is caused not wilfully, but by any excess of violence beyond the limits permitted by the law, for the advancement of the law, or for the purpose of correction, the defence of person or property, or any other lawful purpose, either as regards the means used or the manner of using them."

This Article applies only to *negligent* excesses, a wilful excess would not fall within the rule, and a killing from wilful excess is not provided against by the proposed Statute unless not only the excess but the killing be wilful.

Ch. II., Sect. 5, Art. 14.—"Homicide is not justifiable in self-defence in any case where it is mentioned in Articles 6, 7, and 10 of Section 3 of this Chapter not to be extenuated."

I conceive that the justification in self-defence ought not to be taken away in the cases where by Articles 7 and 10 of Section 3, of Chap. 2, the killing is not extenuated. My reasons for this opinion have already been assigned in my observations on the last-mentioned Articles.

Ch. II., Sect. 6, Art. 2.—"Whosoever shall procure or promote, or be present aiding in or abetting the commission of self-murder, shall incur the penalties of the 2nd class."

It appears to me to be inexpedient to relax the present law as regards the aiding a party in the commission of self-murder. The objections to this alteration are in substance the same with those which oppose themselves to the proposed relaxation of the law in the case of killing another person with his own consent.

Ch. II., Sect. 7, Art. 40.—"Provided also, that it shall be justifiable to cause bodily harm to any other person in any case where, had such person been killed, such killing would have been extenuated under Art. 14 of section 3, of this Chapter, if the party from whose act or omission such harm results neither intended the death of the person to whom such harm is caused to result, nor believed that it would probably result from such act or omission."

As the killing would, under Art. 14, s. 3, Ch. II., have been extenuated in case of consent given by the party killed to the act done, the effect of this Article is circuitously to justify the causing bodily harm to any other person by his consent, provided death was not intended to result or likely to result from the act.

It appears to me that such a provision is at variance with the present law, which on principles of sound policy does not permit a party to justify a battery by consent of the person beaten, even in a civil action, and still less a wounding or mutilation of the person—such an alteration would have a direct tendency to encourage the making of experiments on the human frame dangerous to life; and although the law would still deem practices against life by cruel bargains to be highly illegal, the alteration would sanction such as would clearly be contrary to sound policy.

Ch. III., Art. 1.—"The term 'grievous bodily harm' shall be deemed to signify any harm whereby any organ of sense or any member of the human body is rendered permanently imperfect; the fracture or dislocation of any bone, or any bodily harm whereby the person to whom it is caused is, during the space of 20 days at the least, in bodily pain, diseased or unable to follow his ordinary calling or pursuits."

It seems to me that the description of bodily harm by which a person "is for 20 days at least in bodily pain, diseased or unable to follow his ordinary calling," although sanctioned by the French Code, is too vague to serve as a test of criminality, so much must evidently depend on fortuitous and collateral circumstances wholly unconnected with the real character of the offence.

The issue in the case of a charge of an assault with intent to inflict grievous bodily harm, except in the specified cases of permanent injury, breaking a bone, &c., would be a singular one, viz.—whether the offender intended to inflict an injury to the extent of producing incapacity, &c. for 20 days. And if the above description of grievous bodily harm be retained, it would seem to be requisite to use other terms for determining the offence of rape (*see* Article 19) inasmuch as consent might well be presumed to be extorted by means of threat of bodily suffering, not comprehended within the specific terms of the above definition. Similar observations are also applicable to the law concerning duress.

It will be observed, that the revised Digest of the Law of Homicide excludes the following rule contained in the Digest as prepared by the former Commissioners:—

"Homicide is unlawful (and manslaughter), where death is occasioned not wilfully, but in consequence of any unlawful violence or injury to, or endeavour to injure the person of any other."

Cases within the operation of this rule are excluded from the revised Digest, on the principle that no acts or omissions ought to be punishable which are merely accidental; that is, which are neither wilfully done nor result from culpable negligence; and consequently, that the act of killing is not punishable, if the result be accidental, even although it result from an act of illegal violence to the person. Although I agree that where death is a mere accidental result from an illegal or immoral act, wholly unconnected with injury to the person, as where a man throwing at a cock, by mere accident kills a child, I do not concur in exempting a party who uses illegal violence to the person, although the result was but accidental. I found my dissent from the proposed general exception where death is an accidental result on the ground that this is contrary to the present law. For, according to Sir M. Foster, if one give another a box on the ear, or strike with a stick, or other weapon not likely to kill, and unluckily and against his intention kills, it is manslaughter.—Foster, Disc. II., ch. 5, ss. 1–2; and ch. 1, ss. 1–2; 1 East's P. C., ch. 5, s. 32; 1 Hale, 39; Comb. 407–8; 1 Lord Ray. 142–144; 2 Lord Ray. 1498.

I conceive that the law, in punishing in respect of homicide, although it be but accidental, when it results from violence to the person, operates to the protection of the person in increasing the peril of offering any violence to the person, and inculcating a due sense of the high regard in which human life and safety ought to be held. I deem it proper to add, that the principle of exemption from the penalties of homicide is not consistent even with the law as proposed. If A., endeavouring to murder B., by mere accident kill C., he is justly punishable for the murder of C., although the death of C. was purely accidental. It may be said, that the punishment of A. is justifiable on the principle of deterring offenders from making attempts to murder, inasmuch as the offender knows that if he miss his aim and kill a person not intended, by accident, he is liable as though he had killed the person intended. Admitting such reasoning to be just, and that it were possible that an offender not deterred from an act by penalties, which he set at nought (expecting to execute his scheme), was capable of being deterred by the consideration that he might miss him whom he wished to kill, and might, contrary to all probability, kill another: the same principle would apply, even with greater force, to one who intended to inflict moderate violence on the person of another, if he knew that in the unexpected event of death occurring he would be punishable for homicide. The result would be quite as nearly connected with the act in the latter as in the former case, and the penalty accidentally incurred greater than that which could have been inflicted had the meditated offence been executed.

THOMAS STARKIE.

APPENDIX.

DRAFT OF A BILL,

INTITULED

"An Act for Consolidating and Amending so much of the Criminal Law as relates to incapacity to commit Crimes, Duress, the essentials of a Criminal Injury, Criminal Agency and Participation, and Homicide, and other Offences against the Person."

Be it enacted, &c.

1. That the Schedule to this Act annexed shall be deemed and taken to be parcel of this Act, and that the Four Chapters of the same, and the Ten Sections of the said Chapters, and the 146 Articles of the said Sections and the Headings thereof, and the numbers thereof, respectively, shall be deemed and taken to be enacted by this present Act, as if each and every of the said Chapters, Sections, Articles, Headings, and Numbers had been expressly and in terms herein recited, with the usual words and in the usual forms of enactment, or declaration, or proviso, as the case may be; and that from the passing of this Act every one guilty of any offence described in, or defined by, the said Schedule, shall be liable to such punishment as is therein appointed in respect of such offence.

2. That after the passing of this Act, the rule of law whereby a married woman charged with the commission of any crime is, in case her husband be present at the time, presumed to have acted under his coercion, unless it appear that she did not so act; and all rules of law contrary to the provisions of Chapter I. of the said Schedule shall be, and the same are hereby repealed and annulled.

3. That no person shall, after the passing of this Act, be liable to prosecution by any indictment or information in respect of any offence against the person not included in the said Schedule.

4. Provided that nothing hereinbefore contained shall exempt any person from prosecution by indictment or information in respect of any offence against the person not included in the said Schedule in any case where, by any Act or Acts of Parliament, persons committing such offen ce a remade specially punishable on account of the party against whom or the place wherein such offence is committed.

5. Provided also that nothing herein contained shall exempt any offender from any proceeding in respect of any offence against the person in which any magistrate or commissioner is or shall be empowered to exercise any summary jurisdiction without trial by Jury.

6. Provided also that as regards any offence against the person perpetrated before the day of , 1846, and also as regards any offence against the person in part perpetrated by any act done before that day, and which offence shall be completed or consummated on or after that day, the offender shall be punishable as if this Act had not been passed.

7. That after the passing of this Act every offence in respect of which it is declared by the said Schedule that the offender shall incur the penalties of the 6th or any higher class, shall be tried in the same manner and be subject to all the same rules of procedure as if such offence were by the said Schedule declared to be felony; and every offence in respect of which it is declared by the said Schedule that the offender shall incur the penalties of any lower class, shall be tried in the same manner and be subject to all the same rules of procedure as if such last-mentioned offence were by the said Schedule declared to be a misdemeanor.

SCHEDULE TO WHICH THIS ACT REFERS.

CHAPTER I.

Preliminary Declarations and Enactments.

SECTION 1.

Of Incapacity to commit Crimes and Duress.

Art. 1.

No person shall be criminally responsible for any act or omission, who, at the time of such act or omission, is in a state of idiotcy.

Art. 2.

No person shall be criminally responsible for any act or omission, who, at the time of such act or omission, by reason of unripeness or weakness of mind, or of any unsoundness, disease or delusion of mind, wants the capacity, which the law otherwise presumes every person to possess, of discerning that such act or omission is contrary to the law of the land.

Art. 3.

Provided that no person shall be exempted from criminal responsibility by reason of any temporary incapacity, which he shall have wilfully incurred by intoxication or other means.

Art. 4.

Incapacity by reason of unripeness of mind, as in Article 2 of this Section is mentioned, shall be presumed to exist in the case of an infant under the age of seven years, and proof to the contrary shall not be admitted.

Art. 5.

Incapacity by reason of unripeness of mind, as in Article 2 of this Section is mentioned, shall also be presumed to exist in the case of an infant of the age of seven years, and under the age of 14 years, unless the contrary be proved.

Art. 6.

Duress inducing well-grounded present fear of death, shall be sufficient to excuse a person acting under such duress from penal consequences, except in case of treason and homicide.

Art. 7.

Provided that in case of treason in "levying war against the King," or "adhering to the King's enemies," duress shall be sufficient to excuse a person if such duress be a force upon the person accompanied by a well-grounded present fear of death or of grievous bodily harm, at the time of such person's joining rebels, and such force be a continuing force and such fear a continuing fear during all the time of his remaining with them, and provided that such person use every reasonable endeavour to resist or escape.

ART. 8.

Provided also that duress shall be sufficient to excuse a person in respect of supplying money, provisions, stores or any other thing whatsoever to be used in furtherance of any treasonable design or purpose, if such duress be a continuing force accompanied by a continuing well-grounded fear of death or of grievous bodily harm, to the time of supplying such money, provisions, stores or other thing.

ART. 9.

No woman shall be liable to conviction in respect of any act of receiving her husband, or of receiving any other person in his presence and by his authority, or of harbouring or concealing her husband or any other person in his presence and by his authority, or of aiding the escape of her husband from justice.

SECTION 2.

Of wilful, malicious, negligent and accidental Injuries.

ART. 1.

AN injury shall be deemed to consist in any harm, damage or other evil consequence caused to any person in body, mind, reputation, property or right, or any harm, damage or other evil consequence caused to the State or Public.

ART. 2.

An injury resulting from an omission does not subject the person causing it to punishment unless such omission be unlawful. An omission shall be deemed to be unlawful whensoever it is a breach of some duty imposed by law, or gives cause for a civil action.

ART. 3.

An injury shall be deemed to be wilfully caused whensoever the person from whose act or omission such injury results, either directly intended it to result from his act or omission, or, believing that it was in any degree probable that such injury would result from his act or omission, incurred the risk of causing such injury.

ART. 4.

An act shall be deemed to be maliciously done or omitted, and an injury shall be deemed to be maliciously caused, whensoever such act or injury shall be wilfully done or omitted or caused respectively, without justification or excuse.

ART. 5.

An injury shall be deemed to be negligently caused whensoever it is not wilfully caused, but results from want of reasonable caution, in the undertaking and doing of any act, either without such skill, knowledge, or ability as is suitable to the occasion, or without due care taken to ascertain the nature and probable consequences of such act, or where it results from the not exercising reasonable caution in the doing of any act, either as regards the means used or the manner of using them, or from the doing of any act without using reasonable caution for the prevention of mischief, or from the omitting to do any act which a person using reasonable caution would not have omitted to do.

ART. 6.

An injury shall be deemed to be accidentally caused, whensoever it is neither wilfully nor negligently caused. Accidental injuries do not subject the persons causing them to punishment except as is hereinafter in this Act mentioned.

SECTION 3.

Of Criminal Agency and Participation.

ART. 1.

PARTIES to a crime are either principals or accessories.

ART. 2.

Every one is a principal in respect of a criminal act who either does it or causes it to be done otherwise than by a guilty agent; or who is one of several who so jointly do such act or cause it to be done; or who is present aiding in or abetting the doing of such act.

ART. 3.

A party shall be deemed to cause a criminal act to be done within the meaning of the last preceding Article who wilfully causes it to be done by means of any mechanical device or contrivance, or by any innocent person (whether such innocent person act unconciously or under compulsion, or be or be not the person to whom injury is done), or by such means combined, and whether such party be present or absent when the means used take effect, and although accidental circumstances conduce to render the means used effectual for the doing of the criminal act intended.

ART. 4.

Where several distinct acts are essential to any crime, every one who either singly, or jointly with any other person or persons, does any of such acts in order to the commission of such crime, is a principal within the meaning of Articles 1 and 2 of this Section. And where any injury is essential to a crime, and several persons wilfully cause that injury, either by joining in the same act or by jointly or severally doing distinct acts, each of such persons is also a principal within the meaning of Articles 1 and 2 of this Section.

ART. 5.

Every one is a principal in respect of a criminal omission, who being bound either solely or jointly with any other person or persons, to perform any duty imposed by law, criminally omits to perform that duty.

ART. 6.

A party shall be deemed to be present, aiding in or abetting the doing of a criminal act within the meaning of Article 2 of this Section who shall be near enough to lend any help to the person who does or persons who do the act, or to encourage such person or persons with the expectation of help, and who shall by consent or any other means help or encourage such person or persons in the doing of such act.

ART. 7.

Provided that no person shall be deemed to be present aiding or abetting within the meaning of the last preceding Article, who, having agreed with any other person or persons to effect any criminal purpose, shall abandon his design, and so separate himself from such other person or persons, that there was not, at the time when the act was done, any engagement on his part for, or any reasonable expectation in, such other person or persons of help from him.

ART. 8.

Every one is an accessory in respect of a criminal act done who, although not being present within the meaning of Article 6 of this Section, when the act is done, has, by commandment, advice, consent, aid, encouragement or otherwise, directly or indirectly, or immediately or mediately, procured or promoted the doing of it by a principal offender.

Every one is an accessory in respect of a criminal omission who has, by commandment, advice, consent, encouragement or otherwise, directly or indirectly, or immediately or mediately, procured or promoted the omitting by a principal offender to do the act the ommission to do which is criminal.

ART. 9.

No person shall be deemed to have procured or promoted any criminal act or omission who shall, previously to such act or omission, abandon his design; provided that previously to such act or omission he shall countermand the criminal act or omission, and use his utmost endeavour to prevent the doing of such act or to procure the due performance of the act the omission to do which is criminal, and provided also that the party guilty of such act or omission shall know that such act or omission is so countermanded.

ART. 10.

A party shall be deemed to have procured or promoted the doing of a criminal act within the meaning of Article 8 of this Section, although such act shall vary from that the doing of which such party shall have intended to procure or promote, provided the crime intended and the one perpetrated be substantially the same, and the person or thing against whom or with respect to which such crime is perpetrated be the person or thing against whom or with respect to which such crime was intended, or although the person against whom such crime is perpetrated be not the person against whom it was intended, if, by mistake or accident, the injury which constitutes the crime light upon a different person from the one against whom such injury was intended: so also, if the act done be a probable consequence of the endeavour to do that the doing of which is so intended to be procured or promoted.

ART. 11.

An accessory to a crime shall be deemed to be guilty of that crime; and every penal provision of this Act in respect of any criminal act or omission shall be applicable to accessories as well as to principals, as fully and effectually as if every such provision had by express words included accessories.

ART. 12.

If several persons assembled together shall have united in a common design to execute any criminal purpose, or any purpose whatsoever by criminal means, and shall endeavour to execute such design, all shall be deemed to be equally guilty in respect of any act done by any one or more of them in pursuance of and accordance with, such design.

ART. 13.

Provided that if, after several persons shall have so united as in the last preceding Article is mentioned, any of them shall do any criminal act which is beyond the scope of such common design, such of them as shall not be privy or consenting to the criminal act so done shall not be responsible in respect of such act.

ART. 14.

Provided also, that where, after several persons shall have united in such common design as in Article 12 of this Section is mentioned, any of them shall, before the accomplishment of their purpose, or of any criminal act done in furtherance of and within the scope of such design, abandon such design and withdraw from the further prosecution thereof, such person shall not, by reason only of his having so united with others as aforesaid, be responsible in respect of any criminal act done in furtherance of such design, after such abandonment and withdrawal, if previously to such act he shall use his utmost endeavour to prevent the doing of it.

ART. 15.

Whensoever a person would himself be justified or excused in the doing of any act, such justification or excuse shall be deemed to extend to any person acting in his aid or assistance.

ART. 16.

All the provisions contained within this Section, concerning acts done, and their consequences, shall, so far as such provisions may be applicable, apply to unlawful omissions and the consequences of such omissions.

ART. 17.

So every provision of this Section, concerning the commission of an offence, shall be deemed to be applicable to offences consisting wholly or partly in some unlawful omission.

ART. 18.

In case any special provision hereinafter in this Act contained shall be wholly or in part inconsistent with any provision contained under this or the First or Second Sections of this Chapter, such special provision shall nevertheless be effectual to the same extent as if such previous provision, or so much of it as is inconsistent with such special provision, did not exist.

CHAPTER II.

Homicide and other Offences against the Person.

SECTION 1.

Of what Homicide the Law takes Cognizance.

Art. 1.

Homicide is the killing of any human being.

Art. 2.

Where an injury is inflicted upon a child in the womb, such child is not to be deemed to be a human being within the meaning of the last preceding Article unless such child be afterwards born alive.

Art. 3.

It is not essential to being born alive within the meaning of the last preceding Article, that the umbilical cord, whereby the child is connected with the mother, should be separated, or that the circulation of the child's blood should be distinct from that of the mother.

Art. 4.

The law takes no cognizance of homicide unless death result from bodily injury, caused by some act or omission, as contradistinguished from death occasioned by any influence on the mind, or by any disorder or disease arising from such influence.

Art. 5.

It is homicide, although the effect of bodily injury be merely to accelerate the death of one labouring under some previous bodily injury, disorder or disease.

Art. 6.

It is homicide if the death be caused by bodily injury, although by proper remedies and skilful treatment, death might have been prevented.

Art. 7.

It is homicide although through neglect or ill-treatment on the part of the injured person himself or some other, a disease or disorder, which is the immediate cause of the death, ensue from the orignal injury.

Art. 8.

It is homicide although the death be not directly caused by the injury done, nor, as is mentioned in the last preceding Article, by a disease or disorder ensuing from such injury, but by some distinct bodily injury, disease or disorder, resulting from the treatment of the original injury, provided the injury, disease or disorder resulting therefrom were not negligently caused within the meaning of Article 5 of Section 2 of Chapter I. of this Act.

SECTION 2.

Murder.

Art. 1.

Whosoever shall be guilty of Murder shall suffer death.

Art. 2.

Homicide is murder, whensoever the killing is wilful and is neither extenuated within the provisions of Section 3, nor justifiable within the provisions of Section 5 of this Chapter.

ART. 3.

Bearing false witness, with intent to destroy the life of any person, by reason whereof such person suffers death by the sentence of the Law, shall not be deemed to be murder.

SECTION 3.

Extenuated Homicide.

ART. 1.

WHOSOEVER shall be guilty of extenuated homicide shall, except as hereinafter mentioned in Article 16 of this Section, incur the penalties of the 4th class.

ART. 2.

Homicide is extenuated whensoever the killing is wilful and not justifiable, but the act from which death results is attributable to want of self-control, occasioned by an impulse of passion, fear or alarm, arising from sudden and grave provocation offered by the party killed, which, for the time suspends the power of self-control.

ART. 3.

Homicide is extenuated, although the offender by mistake or accident kills not the person who offered the provocation, but some other person.

ART. 4.

Whether such provocation as is mentioned in the last two preceding Articles existed, and whether, at the time of doing the act from which death results, the passion, fear or alarm, occasioned by such provocation, continued in force, are questions of fact.

ART. 5.

Homicide is not extenuated where the offender either seeks the provocation as a pretext for killing or for doing grievous bodily harm, or where he endeavours to kill or to do grievous bodily harm, whereupon provocation is given.

ART. 6.

Homicide is not extenuated, notwithstanding anything in Article 2 of this Section contained, where an officer or other person lawfully executing any writ, warrant or process, civil or criminal, or lawfully acting in obedience to the command of a magistrate, or otherwise lawfully acting under authority for the advancement of the law, or lawfully interposing for the prevention or suppression of any offence, is wilfully killed, if the party killing had notice that such officer or other person purposed to act under the authority of such writ, warrant or process, or in obedience to such command, or otherwise for the advancement of the law, or interposed for such purpose as aforesaid, or although the party killing had no such notice, if upon resistance unlawfully made to any such officer or other person, he unlawfully interposed, and took part against such officer or other person.

ART. 7.

Whensoever the killing of an officer or other person is not extenuated within the meaning of the last preceding Article if such officer or other person be lawfully executing any writ, warrant or process, civil or criminal, or if such officer be lawfully acting in obedience to the command of a magistrate or otherwise lawfully acting under authority for the advancement of the law, it is not extenuated, although such writ, warrant or process be not sufficient in law, or such command be unlawful, or such officer have no such authority as aforesaid, or the manner of executing such writ, warrant, process, command or other authority, be unlawful, provided such officer or other person believed himself to be respectively lawfully executing such writ, warrant or process, or lawfully acting in obedience to such command, or otherwise under authority for the advancement of the law; and provided the party killing had notice that such officer or other person purposed to act under the authority of such writ, warrant or process, or in obedience to such command, or otherwise for the advancement of the law.

ART. 8.

Homicide is extenuated where an officer or other person believing himself to be lawfully executing any writ, warrant or process, civil or criminal, or, where an officer, believing himself to be lawfully acting in obedience to the command of a magistrate, or to be otherwise lawfully acting under authority for the advancement of the law, although in fact such writ, warrant or process be not sufficient in law, or such command be unlawful, or such officer have no such authority as aforesaid, or the manner of executing such writ, warrant, process, command or other authority, be unlawful, is forcibly resisted, and using no more violence than is necessary to overcome such resistance, kills the person so resisting, or, being by reason of the violence opposed to him, under reasonable fear of death if he proceed to execute that which he believes to be his duty, and because he has reasonable cause for believing that he cannot otherwise execute that which he believes to be his duty and preserve his life, kills him who so resists, provided the party killed had notice that such officer or other person purposed to act under the authority of such writ, warrant or process, or in obedience to such command, or otherwise for the advancement of the law.

ART. 9.

The rules contained in Article 6 and the last preceding Article are to be understood as explained by Articles 4 and 5 of Section 5 of this Chapter.

ART. 10.

Homicide is not extenuated, notwithstanding anything in Article 2 of this Section contained, where an officer or other person has made an arrest, believing himself to be lawfully authorized to make it, although such arrest be unlawful, if any person interpose and take part against such officer or other person and kill him, provided the party arrested was offering no resistance to the arrest at the time of such interposition, and the party killing had notice that such officer or other person purposed to act under the authority of any writ, warrant or process, civil or criminal, or in obedience to the command of a magistrate or otherwise for the advancement of the law.

ART. 11.

The notice intended by Articles 6, 7, and 8 of this Section, and the last preceding Article, is such notice as by Section 5 of this Chapter is made essential to the justification of killing, by officers and other persons acting for the advancement of the law.

ART. 12.

Homicide is extenuated where, upon a sudden quarrel, parties fight in heat of blood and one of them is killed, if the killing be attributable to want of self-control caused by heat of blood and passion.

ART. 13.

In such case it is immaterial which of the parties offered the first affront or or made the first assault.

ART. 14.

Homicide is extenuated whensoever the killing is wilful and not justifiable, but the act from which death results was done, or the act from the omission of which death results, was omitted at the request or with the consent of the party killed.

ART. 15.

Provided that homicide shall not be extenuated within the meaning of the last preceding Article, where the party killed is in a state of idiotcy, or is, by reason of unripeness or weakness of mind, or of any unsoundness, disease or delusion of mind, or of passion, incapable of discerning the nature and consequences of his consent; or where such consent is extorted by the party killing; or where the party killing has reasonable cause for believing that such consent is given, in consequence of some false impression in respect of facts on the part of the person killed at the time of his giving such consent.

ART. 16.

Homicide is extenuated where, if two persons deliberately agree to fight, a contest ensues, and one of them is killed: Provided that if such contest be with deadly weapons, the party killing shall incur the penalties of the 2nd class.

ART. 17.

Homicide is not extenuated in the case of any such contest as in the last preceding Article is mentioned where the death of the person killed is caused in consequence of any unfair advantage taken, or any unfair means used, by the party killing.

SECTION 4.

Negligent Homicide.

ART. 1.

WHOSOEVER shall be guilty of negligent Homicide shall incur the penalties of the 7th class.

ART. 2.

Homicide is negligent whensoever death is not wilfully caused, but results from want of reasonable caution, as is hereinbefore in Article 5 of Section 2 of Chapter I. defined.

ART. 3.

Death shall be deemed to result from want of reasonable caution within the meaning of the last preceding Article, where it is caused not wilfully, but by any excess of violence beyond the limits permitted by the law, for the advancement of the law, or for the purpose of correction, the defence of person or property, or any other lawful purpose, either as regards the means used or the manner of using them.

ART. 4.

Homicide is negligent whensoever death is not wilfully caused, but occurs in any sport, exercise or amicable contest, if weapons, instruments or means be used which cannot be used without probability of causing grievous bodily harm.

ART. 5.

Homicide is not negligent but accidental, where death occurs in any sport, exercise or amicable contest, without intent on either side to cause, and without using weapons, instruments or means likely to cause grievous bodily harm.

SECTION 5.

Justifiable Homicide.

ART 1.

HOMICIDE is justifiable where the act from which death results is done in a lawful manner, in execution of a lawful sentence, by an officer or other person lawfully authorized to execute such sentence.

ART. 2.

Homicide is justifiable where an officer or other person, duly authorized by writ or warrant, to arrest, detain or imprison any party for any offence punishable with death, or upon any charge or suspicion of any such offence, or by reason of any indictment found against him for any such offence, or of any conviction of, or outlawry for, any such offence, or otherwise duly authorized by law to arrest, detain or imprison any party by reason of any such offence committed, or by reason of his conviction of, or outlawry for, any such offence, and using lawful means for the purpose, kills such party in case of flight, or (if such officer or other person have reasonable cause for believing that such party is consenting thereto,) in case of his being rescued, in order to prevent his escape from justice, and because such officer or other person has reasonable cause for believing that such party cannot otherwise be overtaken or his escape from justice prevented.

ART. 3.

Homicide is justifiable where an officer or other person lawfully executing any writ, warrant or process, civil or criminal, or lawfully acting in obedience to

the command of a magistrate, or otherwise lawfully acting under authority for the advancement of the law, or lawfully interposing for the prevention or suppression of any offence, is unlawfully and forcibly resisted, and using no more force than he has reasonable cause for believing to be necessary to overcome such resistance, kills the person so resisting; or, being by reason of the violence opposed to him, under reasonable fear of death, if he proceed to execute his authority, and, because he has reasonable cause for believing that he cannot otherwise execute his authority and preserve his life, kills him who so resists.

ART. 4.

An officer or other person shall be deemed to be acting under authority for the advancement of the law, not only whilst he is actually executing or endeavouring to execute that authority, but also whilst he is proceeding to execute it, or is retreating, having executed, or being unable by reason of resistance or other cause to execute it.

ART. 5.

Every writ, warrant or process, provided it has been issued in the ordinary course of justice, from a Court or by a judicial officer having competent jurisdiction to issue the same, and expresses, either by name or description, the person by and against whom, and, in substance, the cause for which the same is to be executed, is a sufficient writ, warrant or process within the meaning of Article 6 of Section 3 of this Chapter, and Article 3 of this Section.

ART. 6.

It is essential to every justification of killing, by an officer or other person acting by virtue of any writ, warrant or process, or in obedience to the command of a magistrate, within the meaning of Article 3 of this Section, that at the time such writ, warrant, process or command was executed or attempted to be executed, the person resisting had notice that the officer or other person executing or attempting to execute the same purposed to act under such authority.

ART. 7.

It is sufficient for such justification that the officer or other person gave notice of the authority under which he purposed to act, without exhibiting it.

ART. 8.

It is essential to every justification of killing, by an officer acting for the advancement of the law or interposing for the prevention of any offence, by virtue of his mere official authority and without writ, warrant or process, that the person resisting had notice that such officer had such authority, and that he acted or interposed for such purpose.

ART. 9.

It is not necessary that the notice mentioned in Articles 6 and 8, should have been given in express terms; such notice may be presumed or collected as a matter of fact, from the terms used by the officer or other person, or from other circumstances.

ART. 10.

It is essential to every justification of killing, by a private person acting for the advancement of the law or interposing for the prevention of any offence, of his own authority, that express notice should have been given to the party resisting, that such private person acted or interposed for such purpose.

ART. 11.

Homicide is justifiable where the party killing has reasonable cause for believing it to be necessary, for preventing the perpetration of any offence in respect of which the punishment of transportation for life or any other higher punishment may be awarded, attempted to be committed by violence or surprise against the person, habitation or property of the party killing, or of any other.

ART. 12.

Homicide is justifiable where one in lawful defence of his person repels force by force, and, using no more violence than he has reasonable cause for believing to be necessary for the purpose of self-defence, kills the assailant; or being, from

the violence with which such assailant pursues his purpose, under reasonable apprehension of immediate death, and because he has reasonable cause for believing that he cannot otherwise preserve his life, kills such assailant.

ART. 13.

Homicide in self-defence is justifiable, although the party killing was guilty of an assault, or engaged in an unlawful conflict which led to the homicide. The rule is subject to the following limitations:—

That the party killing did not either commence or provoke the attack with intent to kill or do grievous bodily harm, nor, during the conflict and before the necessity for killing arose, endeavour to kill or do grievous bodily harm;

That he declined further conflict, and quitted and retreated from it, so far as was practicable with safety to his life;

That he killed the assailant because he had reasonable cause for believing it to be necessary so to do, in order to avoid immediate death.

ART. 14.

Homicide is not justifiable in self-defence in any case where it is mentioned in Articles 6, 7, and 10 of Section 3 of this Chapter not to be extenuated.

ART. 15.

Homicide is justifiable where one, in defence of moveable property in his lawful possession, repels force by force, and using no more violence than he has reasonable cause for believing to be necessary, for the defence of such property against wrong, kills the wrongdoer; or, being from the violence with which such wrongdoer pursues his purpose, under reasonable apprehension of immediate death, if he persist in the defence of such property, and because he has reasonable cause for believing that he cannot otherwise defend such property and preserve his life, kills such wrongdoer.

ART. 16.

Homicide is justifiable where one, in defence of house or land in his lawful possession, resisting a person endeavouring by force to enter into or upon such house or land, repels force by force, and, using no more violence than he has reasonable cause for believing to be necessary for the defence of his possession, kills the wrongdoer; or, being, from the violence with which such wrongdoer pursues his purpose, under reasonable apprehension of immediate death if he persist in the defence of his possession, and because he has reasonable cause for believing that he cannot otherwise defend his possession and preserve his life, kills such wrongdoer.

ART. 17.

Homicide is justifiable where one in lawful possession of house or land, after requesting another who has no right to be there to depart, upon such wrongdoer's refusal to do so, is resisted in his endeavour to remove him, and using no more violence than he has reasonable cause for believing to be necessary for the removal of such wrongdoer, kills him; or being, from the violence with which such wrongdoer resists being removed, under reasonable apprehension of immediate death if he persist in his endeavour to remove him, and because he has reasonable cause for believing that he cannot otherwise remove such wrongdoer and preserve his own life, kills such wrongdoer.

ART. 18.

Homicide is justifiable where a party who would have been justified, in self-defence or otherwise, in killing one person, by mistake or accident, and without negligence, kills another person.

ART. 19.

Homicide is justifiable where death results from an act done in good faith with the intention of affording succour or aid to any other person, by rescuing him from danger or curing him of any bodily injury, or of any disorder or disease, or where death results from any other act done with a view to the bodily safety or health of any other person, without any intention in any such case to kill or injure such person, provided that no unnecessary risk or peril be wilfully incurred; and provided also that the act be not attributable to want of reasonable caution.

SECTION 6.

Self-Murder.

ART. 1.

WHOSOEVER, with the direct intention of causing his own death or that of some other person, shall do or omit any act from the doing or omission of which his own death shall result, shall be deemed to have committed self-murder: Provided that where such act is done or omitted, with the intention of causing the death of some other person, it be so done or omitted under such circumstances that had such other person been killed such killing would have been murder.

ART. 2.

Whosoever shall procure or promote, or be present aiding in or abetting the commission of self-murder, shall incur the penalties of the 2nd class.

SECTION 7.

Other Offences against the Person.

ART. 1.

WHOSOEVER shall administer to, or cause to be taken by, any other person any poison or other destructive thing, or shall by any means manifesting a design to kill, cause bodily harm to any other person, with intent in any of the cases aforesaid to commit murder, shall suffer death.

ART. 2.

Whosoever shall by any means manifesting a design to kill other than the actually administering or causing to be taken poison or any other destructive thing, attempt to commit murder, shall, although no bodily harm shall be caused, incur the penalties of the 4th class.

ART. 3.

Whosoever shall set fire to, cast away or in anywise destroy any ship, vessel, boat or raft, with intent to murder any other person, or shall maliciously do any such act whereby the life of any other person shall be put in danger, shall suffer death.

ART. 4.

Whosoever shall by any means not hereinbefore in this Section specified, maliciously put the life of any other person in danger, shall incur the penalties of the 7th class.

ART. 5.

Whosoever shall negligently, as hereinbefore in Article 5 of Section 2 of Chapter I. defined, cause any danger to the life of any other person shall incur the penalties of the 9th class.

ART. 6.

Whosoever shall maliciously cause to any other person any grievous bodily harm shall incur the penalties of the 3rd class.

ART. 7.

Whosoever shall forcibly resist any officer or other person whilst such officer or other person believes himself to be lawfully executing any writ, warrant or process, civil or criminal, or whilst such officer believes himself to be acting in obedience to the command of a magistrate, or to be otherwise lawfully acting under authority for the advancement of the law, although in fact such writ, warrant or process be not sufficient in law, or such command be unlawful, or such officer have no such authority as aforesaid, or the manner of executing such writ, warrant, process, command or other authority, be unlawful, and shall in so resisting (although he use no more violence than the law permits for the purpose of self-defence) cause any grievous bodily harm to such officer or other person, shall, provided the person causing such harm had notice that such officer or other person purposed to act under the authority of such writ, warrant or process, or

in obedience to such command, or otherwise for the advancement of the law, incur the penalties of the 3rd class.

ART. 8.

The notice intended by the last preceding Article is such notice as, by Section 5 of this Chapter, is made essential to the justification of killing by officers and other persons acting for the advancement of the law.

ART. 9.

Whosoever shall maliciously, by any means manifesting a design to cause grievous bodily harm, attempt to cause grievous bodily harm to any other person, shall, whether any bodily harm be caused to such person or not, incur the penalties of the 4th class.

ART. 10.

Whosoever shall negligently, as hereinbefore in Article 5 of Section 2 of Chapter I. defined, cause to any other person any grievous bodily harm, shall incur the penalties of the 11th class.

ART. 11.

Whosoever shall maliciously impede any other person endeavouring to save his life from any ship or vessel which shall be in distress, or wrecked, stranded or cast on shore (whether such person shall be on board or shall have quitted the same), shall incur the penalties of the 4th class.

Art. 12.

Whosoever shall set or place, or cause to be set or placed, any spring-gun, man-trap or other engine calculated to destroy human life or cause grievous bodily harm, with intent that the same or whereby the same may kill or cause grievous bodily harm to any trespasser or other person coming in contact therewith ; or shall knowingly and wilfully permit any such engine which may have been set, fixed or left in any place being in his possession or occupation, to continue so set or fixed in such place, shall incur the penalties of the 9th class.

ART. 13.

The rule contained in the last preceding Article shall not extend to make it illegal to set any gun or trap, such as may have been or may be usually set with intent to destroy vermin ; or to set or cause to be set during the night-time any spring-gun, man-trap or engine which shall be set or continued to be set in a dwelling-house for the protection thereof.

ART. 14.

The definition of the terms " night-time," and " dwelling-house," for the purposes of burglary, shall be applicable to those terms as used in the last preceding Article.

ART. 15.

Every woman being with child, who, with intent to procure her own miscarriage, shall maliciously administer to herself any poison or other noxious thing, or use any instrument or other means whatsoever ; and every person who, with intent to procure the miscarriage of any woman whether she be or be not with child, shall maliciously administer to or cause to be taken by her any poison or other noxious thing, or use any instrument or other means whatsoever, shall incur the penalties of the 4th class.

ART. 16.

Provided that no act specified in the last preceding Article shall be punishable where such act is done in good faith with the intention of saving the life of the woman whose miscarriage is intended to be procured.

ART. 17.

Where any woman shall have been delivered of a child, every person who shall by any secret disposition of the dead body of such child, whether such child died before, at, or after its birth, endeavour to conceal the birth of such child, shall incur the penalties of the 10th class.

ART. 18.

Whosoever shall unlawfully and carnally know any woman against her will and by force, or whilst she is insensible, shall be guilty of rape and incur the penalties of the 2nd class.

ART. 19.

It is rape, although the woman consent to carnal knowledge, if such consent be given through fear of death or of grievous bodily harm.

ART. 20.

A husband cannot be guilty of committing, by his own person, a rape on his wife; but if another person commit the offence, he may be liable as an accessory, or for being present aiding or abetting.

ART. 21.

Provided that no person shall be deemed to be a husband within the meaning of the last preceding Article where the woman shall have been compelled, or shall have been by fraud induced to go through the ceremony of a marriage, and either such ceremony shall be a mere nullity, or the marriage shall by reason of such compulsion or fraud be declared to be void *ab initio* by a Court of competent jurisdiction.

ART. 22.

Whosoever by pretending to be the husband of any married woman, or knowing that any married woman believes him to be her husband, shall deceitfully and carnally know her, shall be punishable as for rape.

ART. 23.

Whosoever shall unlawfully and carnally know and abuse any girl under the age of 12 years shall incur the penalties of the 2nd class.

ART. 24.

Whosoever shall administer to or cause to be taken by, any woman, any drug or other thing, with intent to render her insensible, or to produce in her an unnatural sexual desire or such stupor as to prevent or weaken resistance, in order that whilst in that state he or any other person may unlawfully and carnally know her, shall incur the penalties of the 10th class.

ART. 25.

Whosoever shall commit the crime of buggery, either with mankind or with any animal, shall incur the penalties of the 2nd class.

ART. 26.

Any the least degree of penetration, although there be no emission of seed, shall be sufficient to constitute carnal knowledge in relation to the crimes mentioned in Articles 18, 22, 23, and 25.

ART. 27.

Whosoever shall assault any woman with intent to commit any of the crimes mentioned in Articles 18, and 22; or any girl, with intent to commit the crime mentioned in Article 23, shall incur the penalties of the 8th class.

ART. 28.

Whosoever shall assault any person, with intent to commit the crime mentioned in Article 25, or shall offer or make any solicitation, persuasion, promise or threat to any person, whereby to move or induce such person to commit or permit such crime, shall incur the penalties of the 8th class.

ART. 29.

An infant under the age of 14 years shall, notwithstanding anything in Chapter I., Section 1, Article 4 contained, be deemed to be incapable, by reason of impotency, of committing, by his own person, any of the crimes contained in Articles 18, 22, 23, and 25, or any assault with intent to commit by his own person any of those crimes.

ART. 30.

Whosoever shall, from motives of lucre, take away or detain against her will any woman in anywise entitled to any interest, legal or equitable, present or expectant, in any property whatsoever, or being presumptive heiress or co-heiress, or presumptive next of kin, or one of the presumptive next of kin to any one having any such interest in property, with intent to marry or defile her, or to cause her to be married or defiled by any other person, shall incur the penalties of the 4th class.

ART. 31.

Whosoever shall take away or detain against her will, any woman, with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person, shall incur the penalties of the 7th class.

ART. 32.

Whosoever shall unlawfully take, whether with or without her consent, any unmarried girl, being under the age of 16 years, out of the possession and against the will of her father, mother or any other person having the lawful care or charge of her, shall incur the penalties of the 7th class.

ART. 33.

Whosoever shall unlawfully lead or take away, or decoy or entice away or detain any child, under the age of 10 years, with intent to deprive the parent or parents, or any other person having the lawful care or charge of such child, of the possession of such child, or with intent to steal any article upon or about the person of such child, to whomsoever such article may belong; or shall, with any such intent, receive or harbour any such child, knowing the same to have been, by force or fraud, led, taken, decoyed, enticed away or detained as hereinbefore in this Article mentioned, shall incur the penalties of the 6th class.

ART. 34.

Provided, that no person who shall have in good faith claimed to be the father of an illegitimate child, or to have any right to the possession of such child, shall be liable to be prosecuted by virtue of the last preceding Article on account of his getting possession of such child, or taking such child out of the possession of the mother or any other person having the lawful charge thereof.

ART. 35.

Whosoever shall maliciously send as prisoner or transport any subject of this realm into any parts beyond the seas, whether within or without the dominions of Her Majesty, shall incur the penalties of the 4th class.

ART. 36.

Whosoever shall arrest any clergyman upon or under the pretence of executing any civil process, whilst he shall be performing Divine Service or shall, with the knowledge of the person so arresting, be going to perform the same or returning from the performance thereof, shall incur the penalties of the 9th class.

ART. 37.

Whosoever shall be guilty of any unlawful restraint of the personal liberty of any other person shall incur the penalties of the 7th class.

ART. 38.

Whosoever shall maliciously or shall negligently, as hereinbefore in Article 5 of Section 2 of Chapter I. defined, cause any bodily harm or do any violence to the person of another, shall incur the penalties of the 12th class.

ART. 39.

Provided that it shall be justifiable to do or omit anything the malicious doing or omission of which respectively is an offence within any of the Articles 3, 4, 6, 9, 11, and 38 of this Section, in every case where, had the person against or with respect to whom such thing is done or omitted respectively been killed, under the same circumstances, such killing would have been justifiable.

ART. 40.

Provided also, that it shall be justifiable to cause bodily harm to any other person in any case where had such person been killed such killing would have been extenuated under Article 14 of Section 3 of this Chapter, if the party from whose act or omission such harm results neither intended the death of the person to whom such harm is caused to result nor believed that it would probably result from such act or omission.

ART. 41.

Provided also, that no person shall be liable under any Article of this Section for negligently causing any grievous or other bodily harm or violence to any other person, in any case where had the party to whose person harm or violence is done been killed under the same circumstances, such killing would not have amounted to negligent homicide.

ART. 42.

Whosoever shall assault any other person, shall incur the penalties of the 13th class.

ART. 43.

An assault consists in any attempt, offer, or menace by gestures, to cause any bodily harm or to do any violence to the person of another, by one who has present ability to cause such bodily harm or to do such violence.

ART. 44.

Whosoever shall, in any case not provided for by this Act, attempt to commit any offence against this Act by any assault or other act whatsoever, done in part execution of a design to commit such offence, or with the immediate intent to accomplish the criminal object, shall, although he fail in such attempt, in case such attempted offence shall subject any person committing the same to the penalties of the 6th or any higher class of penalties, incur the penalties of the 7th class ; and shall, in case such attempted offence shall subject any person committing the same to the penalties of any lower class, incur any penalties by fine or imprisonment or both, not exceeding one-half of those which he would have incurred had he committed such last-mentioned attempted offence.

ART. 45.

If any injury, the causing of which is a crime within any Article of this Chapter, be intended to result, or if the party causing it believe it to be in any degree probable that such injury will result, to one person, and, through mistake or by accident, it light upon another person, the party so causing such injury shall be punishable in the same manner as he would have been punishable had the person intended to be injured, or to whom it was believed to be in any degree probable that such injury would result, been the person injured.

ART. 46.

If any injury, the causing of which is a crime within any Article of this Chapter, be intended to result, or the party causing it believe it to be in any degree probable that such injury will result to some person, but not to any person in particular, and it light upon any person, the party causing it shall be punishable in the same manner as he would have been punishable had the person injured been intended to be injured, or had the party causing such injury believed it to be in any degree probable that such injury would result to the person injured.

ART. 47.

A person shall be punishable in respect of any injury, the causing of which is a crime within any Article of this Chapter, although the act done or means used to cause it, take effect in a manner not intended nor believed to be in any degree probable by the person doing such act or using such means, provided he would have been punishable, had such act or means taken effect in the manner intended or believed by him to be in any degree probable.

CHAPTER III.

Definition of Terms and Explanations.

Art. 1.

The terms following, wheresoever occurring throughout this Act, shall be understood as hereafter defined: that is to say,—

The term "grievous bodily harm" shall be deemed to signify any harm whereby any organ of sense or any member of the human body is rendered permanently imperfect, the fracture or dislocation of any bone, or any bodily harm whereby the person to whom it is caused is, during the space of 20 days at the least, in bodily pain, diseased or unable to follow his ordinary calling or pursuits.

Art. 2.

The term "woman" shall be deemed to signify any female human being whatsoever may be her age.

Art. 3.

The term "judicial officer" shall be deemed to signify any judge, magistrate, or other officer invested with authority to decide matters submitted to him in the course of justice, according to law and right.

Art. 4.

Wheresoever throughout this Act, in describing any offence, or the offender, or the party affected or intended to be affected by any offence, words are used importing the singular number, or the masculine gender only, yet they shall be understood to include several persons as well as one person, and females as well as males, unless it be otherwise specially provided, or there be something in the subject or context repugnant to such construction.

CHAPTER IV.

Chapter of Penalties.

Art. 1.

Whosoever shall commit any offence for which it is declared by this Act that the offender shall suffer death, shall, on lawful conviction thereof, be adjudged to suffer, and shall suffer according to the provisions of the first class of penalties hereinafter set forth.

Art. 2.

Whosoever shall commit any offence for which it is declared by this Act that the offender shall incur the penalties of any specified class of the penalties hereinafter set forth, shall, on conviction thereof, be adjudged to suffer, and shall suffer the penalties of the particular class so specified, according to the provisions of such class; and such penalties, where discretionary, and the extent or amount of such penalties, where the extent or amount is discretionary, shall respectively be at the discretion of the Court.

Art. 3.

Each of the several classes of penalties hereinafter set forth shall be deemed to be higher class than any class which numerically follows it.

Art. 4.

Whosoever shall, without collusion, have been summarily convicted by virue of any Act or Acts of Parliament, of any offence which is also an offence within any Article of this Act, and shall have paid such fine and costs, or received a

remission thereof from the Crown, or have suffered such imprisonment as such offender shall have been adjudged to pay or suffer respectively, or shall have been discharged from such conviction according to law, shall not be liable to be again punished under any Article of this Act.

ART. 5.

The classes of penalties hereinafter set forth shall not be deemed in any to affect any law concerning forfeiture, or any other collateral consequence to which an offender is now liable on a conviction of any offence which is an offence under this Act; nor to extend any such law or consequence to any offence, which is an offence under this Act, not now liable to the same.

ART. 6.

The classes of penalties to which offenders shall be liable under the provisions of this Act are the following:—

1st Class.

The offender shall be hanged by the neck until such offender be dead; and in addition, upon a conviction of murder, the body of such offender shall be buried within the precincts of the prison in which such offender shall have been confined after conviction.

2nd Class.

Transportation for life, or for any other term not less than seven years.

3rd Class.

Transportation for life, or for any other term not less than seven years, or imprisonment for any term not exceeding three years nor less than one year.

4th Class.

Transportation for life, or for any other term not less than seven years, or imprisonment for any term not exceeding three years.

5th Class.

Transportation for any term not exceeding ten nor less than seven years, or imprisonment for any term not exceeding three years.

6th Class.

Transportation for the term of seven years, or imprisonment for any term not exceeding three years.

7th Class.

Imprisonment for any term not exceeding three years, or fine at discretion, or both.

8th Class.

Imprisonment for any term not exceeding three years.

9th Class.

Imprisonment for any term not exceeding two years, or fine at discretion, or both.

10th Class.

Imprisonment for any term not exceeding two years.

11th Class.

Imprisonment for any term not exceeding eighteen months, or fine at discretion, or both.

12th Class.

Imprisonment for any term not exceeding one year, or fine at discretion, or both.

13th Class.

Imprisonment for any term not exceeding six months, or fine at discretion, or both.

ART. 7.

Where any person shall be convicted of any offence punishable under this Act, for which imprisonment may be awarded, it shall be lawful for the Court to sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour in the common goal or house of correction, and also to direct that the offender shall be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at any one time, or three months in any one year, as to the Court in its discretion shall seem meet.

ART. 8.

Nothing in this Act contained shall extend to any offence committed in Scotland or Ireland.

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